Supreme Court, U.S.
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Case No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1998

JEHAN ZEB MIR ,

Petitioner , Plaintiff and Appellant

v

F.H.P.,Inc.

Respondent , Defendant and Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR APPELLANT

Petitioner Pro-se ;

Jehan Zeb Mir , MD
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93 pp

QUESTION PRESENTED

Does District Court have jurisdiction to rule on a Federal Rule of Civil Procedure ; Rule 60 (b) motion after Notice of Appeal is filed ?

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page and there are no additional parties.

TAB LE CONTENTS

	Pages
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Appendix	iv
Table of Authorities	v-viii
Statement of Jurisdiction	1
Opinions Below	1
Related Decisions	2
Constitutional and Statutory Provisional Involved	3
Statement of The Case & Facts	4
ARGUMENT IN FAVOR OF ALLOWANCE OF THE WRIT	15
I CERTIORARI BE GRANTED, TO SETTLE A CONFLICT WITHIN THE HOLDINGS OF THE NINTH CIRCUIT COURT AND THIS COURT. TO RESOLVE CONFLICT WITHIN THE NINTH CIRCUIT COURT AND TO RESOLVE CONFLICT BETWEEN THE NINTH CIRCUIT COURT AND OTHER CIRCUIT COURTS. AFFECTING BASIC PROCEDURAL RIGHTS	15
II CONCLUSION	21

APPENDIX

page

Appendix A: Opinion of the Court of Appeals Dated 09/26/98 ..... A1-A7

Appendix B: Rehearing Order of the Court of Appeals. Dated 02/08/99 .....B1-B2

Appendix C: Order of the Ninth Circuit Court of Appeals on Appellant's Motion for Remand. Dated 07/14/97..... C1-C3

Appendix D: Ninth Circuit Court's Ruling for Motion for Reconsideration and Clarification for Denial of Motion for Remand. Dated 10/14/97. D1-D2

Appendix E: District Court's Order Denying Hearing for Rule 60 (b) Motion Dated 05/08/97 ..... E1-E2

Appendix F: District Court's Order Granting Motion for Attorney's Fees Dated 02/18/97 ..... F1- F24

Appendix G: District Court's Order Granting Default Summary Judgment Dated 06/26/96 ..... G1-G23

TABLE OF CITATIONS

Cases Cited: Pages

Aldrich Enterprises, Inc. v.United States
938 F.2d 1134 (10th Cir. 1991)
..... 19

Augusta Fiberglass Coating Inc. v. Fodas
Contracting 843 F. 2d 808 (4th
Circuit, 1988)
..... 9,17

Brown v. United States
976 F.2d 1104,1110-1111
(7th Cir. 1992)
..... 19

Carriger v. Lewis
971 F. 2d at 332 (citing Smith v. Lujan)
..... 16

Commonwealth of Puerto Rico v. SS
Colocotroni 601 F.2d 39,42 (1st Cir. 1979)
..... 18

First National Bank of Salem
v. Hirsch 2d 343,346 &n2
(6th Cir. 1976)
..... 19

Hoai v. Vo,
935 F 2d 308,312 (D.C. Cir. 1991)
..... 20

Meadow v. Employers Health Insurance
47 Fed.3d 1006 (9th Cir. 1995)
..... 11

Newman Productions v. Albright
862 F. 2d, 1368; 1392 (9th Cir.)
..... 14

Pioneer Ins. Co. v. Gelt
558 F.2d 1303,1311-1312
(8th Cir. 1977)
..... 19

Ryan v. United States Line Co.
303 F.2d 47,49 (2nd Cir.1992)
..... 19

Simon v. Gorsuch
715 F.2d 1248,1252 (7th Cir.1983)
..... 19

Smith v. Lujene
588 F.2d 1304, 1307 (9th Circuit, 1979)
..... 9,16,17

Standard Oil Company of California v.
United States 429 US 17, 50 L Ed 2d 21..
97 S. Ct 31 (1976)
..... 13,17

Stein v. Wood
127 F 3d 1187 (9th Cir. Nov. 1997)
..... 12,17

Stone v. I.N.S.
514 U.S. 386, 401-402,115 S. Ct.1537, 1547-48, 131 L. Ed. 2d 465 (1995)
..... 13,16,21

Toliver v. County of Sullivan
(2nd Cir. 1992) citing
..... 19

Travelers Ins. Co. v. Liljeberg Enterprises, Inc.
38 F.3d 1404,1407 n 3 (5th Cir.1994)
..... 19

United States v. Accounts Nos. 3034504504 & 144-07143
971 F.2d 974,988 (3rd Cir.1992)
..... 19

IN RE : Wolf
842 F. 2d 464 (D.C. Cir. 1988)
..... 11

Wright & Miller
2363 Page, 271, 1996.
..... 11

Statues

28 U.S.C. 1291 1

28 U.S.C 1442 1

28 U.S.C 1446(b)..... 6

28 U.S.C 2102(c) 1

Federal Rule of Civil Procedure

Rule 41 (a)(1) 9

Rule 60 (b)..... 2,3,9,10,11,12,13,15, 16,17,18,19,20,21,22

ERISA 11,12

California Code

Health & Safety Code,
Section 1371.4 8

STATEMENT OF JURISDICTION

1. The district court had jurisdiction over subject matter of plaintiff's action due to removal of the action to that court under 28 U.S.C. ,1442 a

2. Jurisdiction in the Court of Appeals was premised on 28 U.S.C. 1291 in that plaintiff appealed from the final decision of the district court ,entered on February 19 , 1997.

3. Judgment of the Ninth Circuit was entered on February 8 ,1999 .The time period for filing the instant Petition for Writ of Certiorari is 90 days . (28 U.S.C. 2102 (c))

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was filed on September 22,1998 and was not published . A copy of the Opinion appears in Appendix A.

The rehearing was denied on February 8,1999.A copy of rehearing order appears in Appendix B.

A copy of the order of the Ninth Circuit Court of Appeals on appellant's motion for remand for consideration of F.R.C.P.; Rule 60 (b) motion ,filed July 16 ,1997 is attached in Appendix C .

A copy of the Ninth Circuit Court's ruling for a motion for Reconsideration and Clarification for denial of motion for remand, filed October 14,1997, appears in Appendix D.

A copy of the District Court's Order denying appellant's motion to ask the court if it would entertain a Rule 60 (b) motion ,filed May 8,`1997 , is attached in Appendix E.

A copy of the District Court's separate unpublished opinion granting motion for attorney's fees , entered on February 18,1997 is attached in Appendix F.

A copy of the District Court's unpublished opinion granting motion for default summary judgment , filed June 26,1996 is attached in Appendix G .

RELATED DECISIONS

There are no related decisions .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition involves the provisions of the Federal Rule of Civil Procedure Rule 60,(b) which provides .

" (b) Mistakes; Inadvertence ; Excusable Neglect; Newly Discovered Evidence ; Fraud , etc. On motion and upon such terms as are just the court may relieve a party's legal representative from a final judgment ,order ,or proceeding for the following reasons: (1) mistake (2) inadvertence,surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been dis covered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation,or other misconducy of an adverse party; (4) judgment is void (5) judgment has been satisfied , released ,or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated ,or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment....."

STATEMENT OF THE CASE & FACTS

Plaintiff , JEHAN ZEB MIR , originally filed his complaint in the State Court as pro-se for payment of medical bills for emergency life threatening stab wounds of major abdominal blood vessels.

The defendant FHP,Inc. had fraudulently denied payment of the bill by alleging that plaintiff had performed surgery on a dead patient .The defendant knew that its allegations and the basis of denial of the medical bill were not true because prior to denying the bill , defendant had reviewed medical records and knew that the patient had vital signs during surgery.

Plaintiff ,appealed to defendant . The defendant denied appeal and instead reported to the hospital where surgery was performed that the plaintiff had performed surgery on a dead patient , causing great embarrassment to the plaintiff .

The hospital committee investigated the matter and wrote to defendant that the surgery was necessary. The defendant continued to refuse to pay.

The defendant litigated the matter in the State Court for several months and then removed the matter to the district court ,Central district ,State of California .

Plaintiff's office computer had broken down and plaintiff needed money to purchase a new computer .

The defendant's attorney informed plaintiff that the FHP,Inc. would pay all the money in the world to him to litigate this matter rather than pay anything to the plaintiff . However , on February 28 ,1995 , after plaintiff's deposition , plaintiff was able to reach an oral agreement with the defendant on the terms that the plaintiff will be *first* paid $ 6,000. on or before March 3 ,1995 ,then the plaintiff will dismiss the case .

The defendant breached the oral agreement by refusing to pay on the date agreed.

In order for re-negotiations to proceed and settle the matter , plaintiff and defendant took their respective motions for Remand and Summary Judgment off the motion calendar.

One of the grounds for plaintiff's motion for remand was based upon untimely Removal pursuant to 28,U.S.C. 1446 (b) ,which requires that the Notice of removal of civil action or proceedings shall be filed within thirty days . The defendant had litigated matter in the State Court for months.

The parties also stipulated that upon execution of the settlement agreement, a dismissal of the action shall be promptly filed with the Court.

On March 15 ,1995 , the defendant sent plaintiff a Settlement Agreement & Mutual Release but sent no check for the payment of the claim as agreed.

The check could have contained a stamped endorsement on the back of the check to be signed by the plaintiff that the payment was in full for all claims. This is not an uncommon practice employed by the insurance companies and health plans to use such endorsement when the checks are issued to contract providers. The defendant had no liability in issuing the check as agreed, since , the acceptance of payment would have been

in itself a primae facie evidence of settlement. That money still has not been paid .

Plaintiff refused to sign the Settlement Agreement and Mutual Release since the settlement Agreement had not complied with the terms and conditions of the oral agreement.

Confronting an impasse after telephone conversations with the defendant's attorney, plaintiff retained an attorney (late) Robert D. Walker on March 15 ,1995 to renegotiate the matter .

On March 18 , 1995 plaintiff notified defendant that he would be represented by an attorney. Attorney Walker notified defendant of his assuming representation of plaintiff.

On March 20 ,1995 , the defendant seeing an attorney on the scene ,without informing plaintiff or his attorney notified district court that the matter had been settled .

Based upon this communication , the district court dismissed the case without prejudice on April 10,1995 .

For several months , the settlement could not be reached because defendant would not pay more than $ 6000. to cover plaintiff's attorney charges in order for plaintiff to preserve its initial settlement amount of $ 6,000.

Plaintiff's attorney filed a complaint in the state court on May 3,1995 to protect four year statutes but did not serve the complaint in order for negotiations to continue with intent to settle the matter.

Failing settlement , the First Amended Complaint was filed on September 29,1995 and was served on October 6,1995. The amended complaint stated three State Causes of Action

(1) Breach of duty to Third Party

(2) Misrepresentation & Estoppel

(3) Statutory Violation of California Health & Safety Code ,Section 1371.4.

The defendant removed case to the Federal Court and filed a counter claim for breach of oral agreement.

The plaintiff's attorney (late)Robert Walker, defaulted on the answer to the counter claim and

then on defendant FHP,Inc. motion for summary judgment.

A default summary judgment was entered on June 26 , 1996 against plaintiff. (Appendix G)

The district court's order granting defendant's motion for attorney's fees for breach of oral contract after attaching to the terms of the oral contract the terms of 'general contract ' in an amount of $ 19,491.25 was entered on February 19, 1997.(Appendix F)

Plaintiff could not locate his attorney till March 18 ,1997 when the plaintiff substituted himself and was barely able to file a timely Notice of Appeal on the 30th day of the entry of Judgment.

Plaintiff filed a motion with the district court to ask if the district court would be willing to entertain a Rule 60 (b) motion pursuant to procedure prescribed in Smith v Lejune 588 F.2d 1304 ,1307 (9th Circuit, 1979)

Grounds for relief stated by plaintiff were based upon F.R.C.P. ; Rule 60 (b)
(i) Excusable Neglect,due to attorney negligence pursuant to Augusta Fiberglass Coating Inc. v

Fodas Contracting 843 F 2d 808 (4th Circuit, 1988)

ii) newly discovered evidence

(iii) fraud, misrepresentation, circumvention and other misconduct.

(iv) lack of subject matter jurisdiction . That plaintiff had genuine issues of material fact and a meritorious defense .

The district court denied the motion that it had no jurisdiction to rule on the F.R.C.P. ;Rule 60 (b) motion . (Appendix E)

Plaintiff then filed motion for remand with 9th Circuit Court of Appeals for consideration of Rule 60 (b) motion by the district court.

The Ninth Circuit Court denied the motion for remand for lack of proof that district court was willing to hear the Rule 60 (b) motion.(Appendix C)

Plaintiff's motion for Reconsideration and Clarification for denial of motion for remand was denied by the Ninth Circuit Court because the opening brief had been filed and case was ready for calendaring. (Appendix D)

On appeal , plaintiff raised three main issues .

1. District court's abuse of discretion in not granting a hearing on F.R.C.P.; Rule 60 (b) motion for relief for reasons of lack of jurisdiction.

2. Lack of district court jurisdiction since the third party independent state law claims of misrepresentation were not pre-empted by ERISA pursuant to Meadow v Employer Health Insurance (47 Fed 3rd. 1006 (9th Cir. 1995)

3. Lack of district court's jurisdiction to alter stipulated terms of the oral agreement by attaching on its own the terms of the 'general contract' in order to award attorney's fees to the defendant contrary to the provisions of F.R.C.P.; Rule. 41 (a) (1) (ii) . (Wright & Miller ,2363 ,Page 271,1996.) (In Re Wolf ; 842 F. 2d 464 (D.C. Cir. 1988) .

Award of attorney fees in case of breach had never been agreed upon in the oral agreement.

The Ninth Circuit Court in its opinion ruled that (Appendix A)

(1) the district court had no jurisdiction to rule on Rule 60 (b) motion

(2) The Claim was pre-empted by ERISA ,district court had removal jurisdiction. Plaintiff's actions directly implicated the terms of the defendant's health plan

(3) upheld the award of $19,491.25 in attorney fees on grounds differing from the one provided by the district court against plaintiff .

The grounds provided by the Ninth Circuit Court for award of attorney's fees to the defendant were breach of unexecuted Settlement Agreement while the district court had awarded attorneys fees by superimposing the terms of ' fundamental contract principle ' upon the stipulated terms of the oral agreement . (Appendix A-5 ; F-18)

Plaintiff petitioned for Rehearing and Suggestion for Appropriateness of an En- Banc hearing , based upon the latest ruling by the Ninth Circuit Court of Appeals that the district court can retain jurisdiction to rule on Rule 60 ,(b) motion after appeal is taken

(Stein v Wood. 127 F 3d 1187(9th Cir.Nov. 1997).

This ruling of the Ninth Circuit Court was based upon the decision of the United States Supreme

Court that pendency of appeal does not affect the district court's power to grant Rule 60 (b) relief. (Stone v I.N.S. 514 U.S. 386 , 401-402,115 S. Ct.1537.1547-48,131 L.Ed.2d 465 (1995)

The United States Supreme Court also affirmed its prior decision that appellate leave is not required to rule on Rule 60 (b) motion. (Standard Oil Company of California v United States ,429 US 17 ,50 L Ed 2d 21 . 97 S. Ct 31 (1976)

The plaintiff raised issue that the court of appeals provided that plaintiff defaulted on counter claim for damages, thereby admitting the allegations contained therein.

Plaintiff raised issue that gravamen of the counter claim is that plaintiff breached oral agreement and not unexecuted written agrement.

That the counterclaim by the defendant failed to state a claim upon which relief could be granted as a matter of law .The counter claim did not allege terms of oral agreement to which plaintiff was bound by default let alone award of attorney's fees in case of default . The counter claim did not even allege that plaintiff had breached the oral

agreement , instead it alleged that the defendant had breached the oral agreement.

"Upon entry of default judgment ,facts which are not established by the pleadings of the prevailing party,or claims which are not well pleaded are not binding and cannot support a judgment"

Newman Productions v Albright 862 F 2d,1368;1392 (9th Cir.)

. . The plaintiff admitted nothing by default , since there was nothing to a admit therefore , summary judgment could not be sustained .

Furthermore , the award of attorney's fees could not be sustained on additional grounds that the declarations by the plaintiff and the defendant's attorney showed that award of attorney's fees in case of a breach of oral agreement was never agreed upon and the written settlement agreement was never executed.

The petition for rehearing was denied and court awarded defendant additional $16,855.00 in attorney's fees.

ARGUMENTS IN FAVOR OF ALLOWANCE OF THE WRIT

I

CERTIORARI BE GRANTED TO SETTLE A CONFLICT WITHIN THE HOLDINGS OF THE NINTH CIRCUIT COURT AND THIS COURT .

&

TO RESOLVE CONFLICT WITHIN THE NINTH CIRCUIT COURT

&

TO RESOLVE CONFLICT BETWEEN THE NINTH CIRCUIT COURT AND OTHER CIRCUIT COURTS , AFFECTING BASIC PROCEDURAL RIGHTS .

The instant petition addresses important issues of basic procedural rights of the litigant to request relief pursuant to Rule 60 (b) of the Federal Rule of Civil Procedure.

This petitioner has a judgment of over $ 40,000 against him for no fault of his own and without ever having been provided with an

opportunity of a hearing to obtain relief pursuant to F.R.C.P.; Rule 60 (b).

The grounds provided by the district court in denying the request to entertain Rule 60 (b) motion was that the district court had no jurisdiction to Rule on Rule 60 (b) motion since plaintiff had filed Notice of Appeal .
(Appendix E)

The Ninth Circuit Court of Appeals affirmed and cited Carriger v Lewis 971 F 2d at 329;332 (citing Smith v Lujan (supra) (Appendix A ;B)

The court awarded $ 16855.50 in attorney's fees for plaintiff appealing the denial by district court of his motion to request leave to entertain a Rule 60 (b) motion for lack of jurisdiction .

The decision of the Ninth Circuit Court in the instant case is in conflict with this Court's decision which provides that pendency of appeal does not affect the district court's power to grant Rule 60 (b) relief .(Stone v I.N.S. 514 U.S. 386,401-402, 115 S.Ct.1537.1547-48,131 L.Ed.2d 465 (1995).

This Court also affirmed its prior decision that appellate leave is not required before district court

entertains a Rule 60 (b) motion.Standard Oil Company of California v United States 429 US 17 ,50 L Ed 2d 21 . 97 S. Ct. 31 (1976)

Even the Ninth Circuit Court, in November 1997 , based upon decision of this Court reversed its prior ruling on Smith v Lujan ,(supra) and provided that district court has the jurisdiction to rule on Rule 60 (b) motion after appeal is taken. (Stein v Wood);127 F 3d, 1187 , 9th Cir. Nov.1997)

However , in the instant case , the Ninth Circuit Court continues to set aside the decision of the United States Supreme Court and its own latest ruling , to the detriment of the petitioner .

Petitioner 's grounds for relief pursuant to F.R.C.P.; Rule 60 (b) are based upon
(i) Excusable Neglect ; due to attorney negligence pursuant to Augusta Fiberglass Coating Inc.v Fodas Contracting. 843 F 2d 808 (4th Circuit,1988) which provides

" When the party is blameless attorney negligence qualifies as " mistake " or as an "excusable neglect " under rule governing relief from judgment, F.R.C.P. Rule 60(b)(i)"

(ii) newly discovered evidence "

(iii) fraud ,misrepresentation, circumvention and other misconduct

(iv) lack of subject matter jurisdiction.

The position taken by the Ninth Circuit Court is confusing , contradictory and placed plaintiff in a burdensome , catch 22 position for getting a hearing for relief from the default judgment .

On one hand ,it required plaintiff to ask the district court if it would entertain a Rule 60 (b) motion before requesting remand , when plaintiff did that it affirmed that district court had no jurisdiction to rule upon such a motion and also denied motion for remand.

In other words, plaintiff was not entitled to a hearing for relief pursuant to F.R.C.P. ;Rule 60 (b) by district court under any circumstances.

Whereas every other Circuit Court in the country provides that the litigant is entitled to hearing on a F.R.C.P. Rule 60 (b) motion by the district court after Notice of Appeal is filed .

(Commonwealth of Puerto Rico v SS Zoe Colocotroni, 601 F 2d 39,42

(Ist Cir.1979)

(Toliver v County of Sullivan, 957 F 2d 47,49 (2nd Cir. 1992) citing

(Ryan v United States Line Co.303 F 2d 430,434 (2nd.Cir.1962)

(United States v Accounts Nos.3034504504 & 144-07143, 971 F 2d 974,988

(3rd. Cir. 1992)

(Travelers Ins.Co v Liljeberg Enterprises,Inc. 38 F 3d 1404 ,1407 n 3

(5th Cir. 1994)

(First National Bank of Salem v Hirsch, 535 F 2d 343 ,346 & n2

(6th Cir. 1976)

(Brown v United States,976 F 2d 1104,1110-1111

(7th Cir. 1992)

(Simon v Gorsuch, 715 F 2d 1248 ,1252

(7th Cir. 1983)

(Pioneer Ins. Co. v Gelt, 558 F 2d 1303, 1311-1312

(8th Cir. 1977)

(Aldrich Enterprises,Inc. v United States, 938 F 2d 1134

(10th Cir. 1991)

(Hoai v Vo, 935 F 2d 308 .312

(D.C. Cir.1991)

It is crucial that the conflict be resolved by this Court. The 1995 decision of this Court ,1997 decision of the Ninth Circuit Court itself and every other Circuit Court supports petitioner's right to hearing for relief pursuant to Federal Rule of Civil Procedure ; Rule 60 (b) motion .

The plaintiff was unfairly denied this right and instead was penalized with a huge award for attorney's fees for no fault of his own and for appealing denial of such procedural right for a hearing requesting relief from judgment .

Punishing petitioner for the negligence of his attorney is just as unreasonable as punishing a patient for the negligence of his or her physician.

The petitioner has spent hundreds of hours in the appellate process in trying to overcome the damage caused by the negligence of his attorney in order to save himself from a major financial catastrophe.

CONCLUSION

In Stone , this Court provided:

" A motion filed , under Rule 60 (b) of the Federal Rule of Civil Procedure for relief from a judgment more than 10 days after the judgment is issued does not toll the running of the time for taking an appeal; the pendency of the motion before a Federal District Court does not affect the continuity of a prior taken appeal; and the pendency of an appeal does not affect the District Court's power to grant Rule 60 relief."

(Stone v INS 514 U.S. 386 ,401-402,115 S.Ct.1537,1547-48.131 l.Ed.2d 465 (1995)

In this case the petitioner presents a claim raising fundamental procedural rights for requesting a hearing for relief pursuant to Federal Rule of Civil Procedure Rule 60 (b).

The decision of the Ninth Circuit Court in the instant case is in conflict with the opinion of this Court with the latest ruling of the Ninth Circuit itself and every other Circuit Court in the country.

The petitioner has a huge judgment of attorney fees against him for no fault of his own and

without ever having been provided an opportunity to request relief pursuant to F.R.C.P.;Rule 60 (b).

The petitioner is blameless and is being punished for the negligence of his late attorney .

The petitioner is particularly penalized for appealing the unjust denial of a hearing for relief from judgment pursuant to Federal Rule of Civil Procedure ; Rule 60 (b) and awarded against him $ 16,855.00 in attorneys fees .

The petitioner prays that for sake of uniformity of decisions and in the interest of justice such a relief is granted.

Respectfully submitted,

Date; April 30 ,1999

_____

Jehan Z. Mir ,MD
Petitioner / Appellant
Plaintiff Pro-se

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED SEPTEMBER 22, 1998

JEHAN ZEB MIR, MD.,
Plaintiff-Cross Defendant-
Appellant,

v.

FHP INC., a corporation,
Defendant-counter
claimant-Appelle,

and

RAMIRO RUEDAS,

Defendant.

Appeal from the United States District Court
for the Central District of California
John G. Davies Judge, Presiding

September 22, 1998

No.97-55424
D.C. No. CV-95-07523-JGD

Memorandum

Before O'SCANNLAIN, FERNANDEZ, and
TASHIMA, Circuit Judges

Jehan Zeb Mir appeals pro se the district court's grant of summary judgment for defendant FHP, Inc. on Mir's action for payment of medical services that he rendered on behalf of decedent Bernardino Ruedas, who was a member on an employee group health care plan administered by FHP. The district court exercised its removal jurisdiction pursuant to ERISA[1] preemption, and subsequently granted summary judgment for FHP, concluding that, by filing the instant action, Mir had breached the terms of a settlement agreement reached in a prior action between Mir and FHP ("MIR 1") that involved the identical dispute. We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

---

[1] The employee Retirement Income Security Act, 29 U.S.C. 1001-1461.

Mir contends that the district court erred by (1) exercising its removal jurisdiction; (2) granting summary judgment for FHP; (3) awarding FHP attorney's fees against Mir for breach of the settlement agreement in MIR 1; and (4) denying his Fed. R. Civ. P. (60) motion for lack of subject-matter jurisdiction. These contentions lack merit.

We review de novo a district court's grant of summary judgment and its determination that removal of an action is proper based upon ERISA preemption. *See Emard v. Hughes Aircraft Co.*, No.96-56584, 1998 WL 510845, at *1 (9th Cir. Aug. 20, 1998). We also review de novo a district court's denial of a Rule 60(b) motion for lack of subject-matter jurisdiction. *See Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992) (en banc). We may affirm

on any basis fairly supported by the record. *See Foster v. Skimmer,* 70 F.3d 1084, 1087 (9th Cir. 1995)(Per curiam).

We conclude that the distric court properly exercised removal jurisdiction, because the record demonstrates that Mir's action directly implicated the terms of the FHP health plan and therefore, was preempted by ERISA. *See Bast v. Prudential Ins. Co.,* No 97-35429, 1998 WL 462694, at *6-7 (9th Cir. Aug. 3, 1998); *Parrino v. FHP, Inc.,* 146F.3d 699, 704-05(9th Cir. 1998); *cf. Meadows v. Employers Health Ins.,* 47 F.3d 1006, 1009-11 (9th Cir. 1995)(holding that a third party health care provider's action was not preempted because the action did not implicate the administration of an ERISA a plan).

We conclude that the district court properly granted summary judgment for FHP, because the uncontroverted facts resulting from Mir's failure to file an opposition to FHP's summary judgment motion established that Mir had breached the settlement agreement in MIR 1 when he instituted the instant action against FHP. *See Emard,* 1998 WL 510845, at *1.

We also conclude that the district court's award of attoney's fees to FHP was proper, becuase the settlement agreement in MIR 1 provided that the prevailing party in subsequent litigation over the agreement would be entitled to recover its attorney's fees, *see Benny v. Pipes,* 799 F.2d 489, 495 (9th Cir. 1986), *amended by* 807 F.2d 1514 (9th Cir. 1987), and Mir defaulted on FHP's

counterclaim for damages, thereby admitting the allegations contained therein[2]

Finally, we conclude that the district court properly denied Mir's Rule 60(b) motion for lack of subject-matter jurisdiction because Mir filed the motion after he had appeal the district court's grant of summary judgment for FHP to this court. *See Carriger*, 971 F.2d at 332.

Mir's remaining contention regarding FHP's purported sanctionable conduct in district court lacks merit.

We deny FHP's request for attorney's fees on appeal without prejudice to the filing of a separate motion requesting an award of such

[2] Moreover, we note that Mir has waived his right to contest the amount of attorney's fees awarded to FHP by failing to raise this issueon appeal. *See Sablan v. Department of Fin.*, 856 F.2d 1317, 1327-28 (9th Cir. 1988).

fees. *See Gabor v. Frazer,* 78 F.3d 459-60(9th Cir. 1996)(order).

AFFIRMED.

APPENDIX B
REHEARING ORDER OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED FEBRUARY 8, 1999

JEHAN ZEB MIR, M.D.,
Plaintiff-Cross Defendant-
Appellant,

v.

FHP INC., a corporation,
Defendant-counter-claimant
Appellee,

and

RAMIRO RUEDAS,
Defendant.

United States Court Of Appeals
For The Ninth Circuit

February 8, 1999

No. 97-55424
DC# CV-95-07523-JGD

Order

Before O'SCANNLAIN, FERNANDEZ, and
TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for hearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en bacn. *See* Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. FHP's request for attorney's fees is granted and fees are awarded to FHP in the amount of $16,855.50.

APPENDIX C
ORDER OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT ON APPELLANT'S MOTION FOR REMAND DATED JULY 16, 1997

JEHAN ZEB MIR, MD
Plaintiff/Cross-Defendant/
Appellant,

vs.

FHP INC.,
Defendant/counter-claimant/
Appelle,

RAMIRO RUEDAS,
Defendant-Appellee.

United States Court Of Appeals
For The Ninth Circuit

July 16, 1997

No. 97-55424
DC # CV-95-7523-JGD

ORDER

Before PETER L. SHAW, Appellate Commissioner

Appellant's "amended motion [for] full remand to state court" is denied without prejudice to renewing the arguments in the briefs. Appellant's alternative motion to remand the proceedings to the district court is denied without prejudice to refiling accompanied by proof that the district court had indicated its willingness to entertain the Fd. R. Civ. P. 60(b) motion to vacate judgment. See Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979).

Appellant's motion for new briefing schedule is granted, in part. Appellant's opening brief and excerpts of record are due August 11, 1997; appellees' brief is due September 10, 1997; the optional reply brief is due within 14 days after service of appelless brief.

Appellant's motion for sanctions and attorney's fees is denied.

Peter L. Shaw, General Order 6.3(e)

APPENDIX D
ORDER BY THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT DATED OCTOBER 14, 1997

JEHAN ZEB MIR, M.D.,
Plaintiff/Cross-Defendant/
Appellant,

vs.

FHP, INC.,
Defendant/Counter-Claimant/
Appellee,

RAMIRO RUEDAS,
Defendant/Appellee.

United States Court Of Appeals
For The Ninth Circuit

October 14, 1997

No. 97-55424
DC# CV 95-7523-JGD

ORDER

Before: THOMPSON and T.G. NELSON, Circuit Judges

Appellant's motion for clarification and reconsideration of the court's July 16, 1997 order is denied.

This Case is ready for calendaring.

APPENDIX E
ORDER DENYING HEARING FOR RULE 60 (b) MOTION BY UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED MAY 8, 1997

JEHAN ZEB MIR, MD., Plaintiff,

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50
Defendants.

United States Distric Court
Central District of California
Western Division

May 8, 1997

Case No. CV 95-7523 JGD (SHx)

Order Denying Plaintiff's Motion Requesting Leave To File Motion Pursuant to Rule 60

Before JOHN G. DAVIES, United States District Judge

The Court has reviewed the written submissions of the parties in connection with Mir's Motion to Grant Hearing on Rule 60 Motion.

The motion is Denied. The Court no longer has jurisdiction over the case. No grounds are stated that would justify the extraordinary relief requested.

IT IS SO ORDERED.

JOHN G. DAVIES
United States District Judge

APPENDIX F
ORDER GRANTING MOTION FOR ATTORNEY'S FEES BY UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED FEBRUARY 19, 1997

JEHAN ZEB MIR, MD., Plaintiff

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50, Defendants.

United States District Court
Central District of California
Western Division

February 19, 1997

Case No. CV 95-7523 JGD (SHx)

Order Granting Defendants' Motion For Attorney's Fees, Alternatively, Motion To Amend Judgment

Before JOHN G. DAVIES, United States District Judge

Factual Background

On September 16, 1996, the defendants' Motion for Attorneys' Fees; Alternatively Motion to Amend Judgment came on for hearing. Having considered the parties' written submissions and the oral argument of counsel, the court hereby GRANTS the motion for the reasons set forth below.

On August 24, 1994, Jehan Zeb Mir, M.D. filed a First Amended Complaint for damages for Refusal to Pay Medical Bills in California Superior Court, County of Los Angeles. The Complaint alleged that on May 12, 1991, Bernardino Ruedas ("Ruedas") was stabbed at a party in Long Beach, California. Ruedas was taken to the emergency room of St. Francis Hospital in Lynwood, California for treatment. Mir was the surgeon on

call at the hospital and treated Ruedas, but Ruedas subsequently died from shock. On May 5, 1991, Mir submitted a bill in the amount of $11,275 to Ruedas' insurer, FHP, Inc., for the services rendered to Ruedas. The bill was never paid.

The Complaint alleged three causes of action: (1) declaratory relief for the amount of medical fees due and owing (11,275); (2) breach of contract as between Ruedas and FHP; and (3) breach of the covenant of good faith and fair dealing. the second and third claims were based on the allegation that Ramiro Ruedas, as Representative of the State of Ruedas, "assigned all rights and privileges to the plaintiff to make a demand on the defendants for payment of his medical bills."

On September 14, 1994, the action was removed by FHP to this Court (Case number CV 94-6211 JGD (Kx)).

On January 11, 1995, FHP mailed Mir a request to dismiss all claims on grounds they were preempted by ERISA. On January 19, 1995, FHP contacted Mir and offered to settle for 5,500. Mir rejected FHP's $5,500 offer by mail, and countered with an offer to settle for $11,275 plus interest. On January 19, 1995, FHP mailed Mir a rejection of Mir's counteroffer. The next day, on January 20, 1995, Mir's counsel advised FHP that Mir would represent himself pro se in the litigation.

On February 7, 1995, FHP filed a Motion for Summary Judgment scheduled for hearing on February 27, 1995. On February 8, 1995, FHP and

Mir held a Meeting of Counsel where FHP again offered to settle for $5,500. On February 24, 1995, Mir filed a Motion to Remand to Superior Court.

At the scheduled deposition of Mir on February 28, 1995, FHP and Mir allegedly discussed settlement, and had two further conversations concerning settlement, and had two further conversations concerning settlement by telephone that evening. As a result of these discussion, the parties came to an oral agreement to settle the case for $6,000, and to withdraw the pending motions for summary judgment and for remand. FHP informed Mir that it would prepare the settlement documentation accordingly.

On March 3, 1995, FHP informed Mir that it was preparing a settlement check and would

forward a written Settlement Agreement to Mir for his signature. The Agreement was sent to Mir on March 14, 1995. FHP informed Mir that once he signed the Agreement and FHP received it, FHP would send the $6,000 settlement check.

On March 15, 1995, the parties signed a Stipulation to Take Plaintiff's Motion to Remand and Defendants' Motion for Summary Judgment Off Calendar ("Stipulation") because "the parties have entered into a settlement of this dispute . . ."

The Stipulation stated: "It is hereby agree and stipulated that Plaintiff Jehan Zeb Mir, M.D.'s Motion to Remand and Defendant FHP, Inc.'s Motion for Summary Judgment currently scheduled to be heard on March 20, 1995, in Department 890 of the above entitled court, be

taken off calendar as both parties have entered into a settlement of the action.

It is further stipulated that upon execution of the settlement documentation a dismissal of the action shall be promptly filed with the Court."

On March 20, 1995, FHP contacted the Clerk of Court and requested that the pre-trial conference be taken off calendar. On March 20, 1995, FHP left a message with Mir's office requesting information regarding the status of the Settlement Agreement, but Mir failed to return the phone call. On March 23 and on April 4, 1995, FHP sent letters to Mir, again requesting that he sign and return the Settlement Agreement. On April 7, 1995, FHP telephoned Mir's office, but Mire did not return the

call. On April 10, 1995, FHP had Mir paged, but he did not respond.

On April 10, 1995, the Court entered and Order providing that "the dispute has been settled, and thus the action is hereby dismissed without prejudice." The Order noted that FHP and Mir had failed to file a dismissal.

On April 11 and April 12, 1995, FHP again phoned Mir's office to discuss the Settlement Agreement, but Mir did not respond. On April 18, 1995, FHP mailed Mir a copy of the April 10, 1995 Court Order, again requesting that he sign the Settlement Agreement and forward it so that FHP could release the $6,000 settlement check.

On April 21, 1995, Mir sent FHP a letter stating:

"I have forwarded all of your correspondence in the above referenced matter to my attorney Robert Walker. Since the matter has been dismissed by the Federal Court, filing of substitution papers is irrelevant. Therefore, I suggest that you contact Mr. Walker at the earliest"

On May 9, 1995, FHP sent a letter to Mir and his attorney expressing concern at the lack of response to the communications regarding the Settlement Agreement. On June 5, 1995, FHP called Mir's attorney, Robert Walker. He stated that he would review the file and discuss it with Mir. On June 15, 1995, FHP sent another letter to Mir and Walker, again expressing concerns about

their failure to respond to FHP's attempts to communicate with Mir.

On May 3, 1995, Mir again filed suit against FHP in Superior Court. The Complaint in the second action was amended on September 29, 1995. The Complaint in the new action was based on similar allegations as the first, but differed from the original suit in that brought the second action as a third party beneficiary rather than as an assignee of Ruedas. The case The Meadows v. Employers Health Insurance, 47 Fed.3d 1006 (9th Cir. 1995) was cited in the complaint for the proposition that ERISA does not preempt state law claims by a third party who sues an ERISA plan not as an assignee of a purported ERISA

beneficiary, but as an independent entity claiming damages.

Three claims for damages were alleged in the second complaint: (1) Mir alleged that he was damaged in the amount of $11,275 because FHP breached its duty to Ruedas by failing to pay between Mir and FHP, for the medical services he provided to Ruedas. (2) FHP misrepresented to Mir that FHP would pay for the medical services he provided to Ruedas. (3) FHP violated the "1975 Act dealing with the time for and the manner of payments made to third-party health care providers."

On November 3, 1995, FHP removed the second Complaint to this Court. On November 13, 1995, FHP filed a Counter-Claim for Breach of

Settlement Agreement against Mir. The Counter-claim alleged that Mir breach the oral settlement agreement by (1) refusing to execute the written Settlement Agreement, (2) failing to dismiss the action (CV 94-6211 JGD (Kx) upon which the settlement was based, (3) filing the second action and its original version in Superior Court. FHP claimed damages from having to defend this action and commence the Counter-claim. In the Prayer for Relief of the Counter-claim, FHP petitioned the court for (1) compensatory damages; (2) interest on aid sum from and after March 1, 1995; (3) attorney's fees; (4) cost of the suit.

Mir did not file an answer to FHP's Counter-claim.

On December 19, 1995, the Clerk entered default against Mir on the Counter-claim for failure to file an Answer pursuant to FRCP 55(a) and Local Rule 14.10.

On May 24, 1996, FHP filed a Motion for Summary Judgment; or in the Alternative, Motion to Enforce Settlement Agreement, set for hearing on June 17, 1996. In the motion, FHP moved for summary judgment on grounds that: (1) Mir is barred form relitigating this action because it was settled pursuant to a binding settlement agreement. (2) Mir's failure to execute the written settlement agreement in accordance with the terms of the oral settlement agreement constitutes a breach of the oral agreement.

In support of the motion, FHP offered the unexecuted written settlement agreement and the Stipulation as proof that an oral agreement existed between the parties.

No Opposition to the defendants' motion for summary judgment was filed, and neither Mir or his counsel appeared at the June 17, 1996 hearing on motion. The court granted summary judgment to the defendants.

In the Order granting summary judgment to the defendants the Court provided:

> "Mir fails to demonstrate the existence of any genuine issues of material fact. Because there are no genuine issues regarding the existence of a binding settlement agreement barring re-

litigation of the claims in this action the defendants are entitled to summary judgment on all causes of action in the First Amended Complaint, and on the Counterclaim."

Accordingly, the motion for summary judgment on the First Amended Complaint and the Counterclaim is GRANTED in the present action, case number 95-7523 JGD (SHx)."

On June 29, 1996, the Court entered Judgment in favor of the defendants.

Contained in defendants' motion for summary judgment was a request for an award of attorney's fees based on the terms of the Settlement Agreement and detailed in the Counter-claim.

Discussion

With the instant motion FHP seeks an award of attorney's fees in the amount of $19,491.25, allegedly expended in defending against Mir's second action and prosecuting the Counter-claim. The defendants explain the total includes fees "defending against the plaintiff's claims, prosecuting the counter-claim, attending mandatory hearings, corresponding and telephone conversations between the parties, preparing and filing the motion for summary judgment, attending the hearing on the motion for summary judgment and preparing the motion." The amount includes $1,375.00 in fees for preparation of the instant motion.

In support of the motion, the defendants cite the fact that the Court entered Judgment in their favor in the Counter-claim on June 29, 1996.

In the Opposition, Mir contends that FHP's claim for attorney's fees are without grounds. The argument is encapsulated as follows:

> "Defense counsel now attempts to obtain attorney fees pursuant to the terms of writing . . . which was clearly not executed by anyone. In addition the summary judgment executed by the Court declares that the settlement agreement being enforced was an oral agreement whereby Dr. Mir was to received $6,000 and the matter disposed of. The oral agreement thus enforced was silent as to any attorney fee feature. It was a standard, 'we'll pay $6,000 and send you the closing documents,' which was never formalized. Thus, there is absolutely no basis for an award of attorney fees and costs to the defendant, either for prior proceedings or this motion."

The defendants motion is GRANTED, though not on the particular grounds raised by the

defendant. FHP is entitled to reasonable attorney's fees not pursuant to the terms of the unexecuted Settlement Agreement, but based on fundamental contract principle. In granting FHP's motion for summary judgment on the Counter-claim, and later, Judgment in favor of FHP, the Court found that an agreement existed between the parties to settle the dispute. "Mir is barred from re-litigating this action because it was settled pursuant to a binding settlement agreement. Such attempts [to re-litigate] constitute a breach of the agreement. Additionally, Mir's failure to execute the written settlement agreement in accordance with the terms of the oral agreement constitutes a breach of the oral agreement." Order, June 28, 1996 at 11.

If FHP had had the "benefit of its bargain," it would not have incurred additional litigation expenses and attorney's fees subsequent to the settlement. Mir breached that agreement, and is consequently liable for the damages suffered by FHP that arise from the breach. Such damages include the attorney's fees the defendants now seek. On this basis, FHP is properly entitled to an award of its reasonable attorney's fees.

Dr. Mir's counsel, Robert Walker, appears to imply that the plaintiff's failure to oppose FHP's motion for summary judgment or appear for the hearing held on June 17, 1996, may somehow have resulted from problems with notice. The Opposition states:

> "The first time that Dr. Mir's counsel became aware of what had transpired at the June 17th summary judgment hearing was

> when he read the judgment attached tot he instant motion. That judgment bears a service list that does not contain the street address of Dr. Mir's counsel, which is 3250 Whilshire Boulevard. It is believed that the judgment never reached the offices of counsel for Dr. Mir, but if it did, it was never brought to the attention of counsel--which would be very irregular in light of counsel's mail handling protocol."

Plaintiff's Memorandum of Points and Authorities and Declaration of Robert D. Walker in Opposition to Defendant FHP, Inc's Motion for Attorney's Fees, p. 4.

The plaintiff's argument concerning notice is unpersuasive, and is not valid grounds to challenge the Court's ruling on the motion for summary judgment, or to deny the defendants' current motion for attorney's fees.

Irrespective of proper service, its apparent that Mir's lawyer, Mr. Walker, knew of the motion for

summary judgment and the hearing date, as well as FHP's intention to proceed with both, prior to the June 17, 1996 hearing. Walker was informed of this by defendants' counsel both in a telephone conversation Walker had with FHP's lawyer Francis Drelling on June 14, 1996, and by fax and mail on June 14, 1996. See Reply, Exhib. A. During the June 14, 1996 telephone conversation, Mr. Walker stated to Mr. Drelling that he was uncertain whether he would be able to appear at the June 17, 1996 hearing on the motion because he had a conflicting appointment. The declaration states that Walker was on vacation at the time of the hearing.

In a declaration accompanying the plaintiff's Ex Parte Application for Order Continuing Hearing

Date For Motion for Attorney's Fees, filed on August 1, 1996, Mr. Walker indicates that he knew of the motion for summary judgment, but had though that it was "rendered moot by our settlement." In the opposition, Walker states "[w]hen defense counsel filed the motion for summary judgment or in the alternative to enforce the settlement agreement, Dr. Mir and present counsel agreed that the case had to be settled . . ." Opp. at 3. This statement implies knowledge of the motion prior to the hearing.

Based on the foregoing, it is clear that Mir's counsel was aware of the pending motion for summary judgment against his client prior to the hearing date. Yet Mr. Walker failed to communicate with the Court concerning the motion

in any fashion, either in the form of a request for a continuance or any response to the motion Walker did not pursue a stipulation with FHP's counsel to continue the hearing or withdraw the motion, nor did he seek any confirmation for his supposed belief the motion had become "moot". Indeed, Walker was expressly informed by FHP that it intended to proceed with the motion at the noticed June 17, 1996 hearing. Thus, the plaintiff's arguments concerning notice do not affect the Court's disposition of the defendants' motion.

The amount of the fees requested by the defendants appears reasonable to the Court. Thus, it is HEREBY ORDERED that the defendants shall recover reasonable attorney's fees in this action in the amount of $19,491.25.

Conclusion

The motion is GRANTED. The court orders that the defendants shall recover reasonable attorney's fees in this action in the amount of $19,491.25.

ITS IS SO ORDERED.

JOHN G. DAVIES
United States District Judge

APPENDIX G
OPINION OF THE UNITED STATES DISTRICT COURT , CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED JUNE 26, 1996

JEHAN ZEB MIR, M.D., Plaintiff

v.

FHP, INC., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50, Defendants.

United States District Court
Central District of California
Western Divison

June 26, 1996

Case No. CV 95-7523 JGD (SH x)

Order Granting Summary Judgment On First Amended Complaint And Counterclaim

Before JOHN G. DAVIES, United States District Judge

On June 17, 1996, the defendant's Motion for Summary Judgment; or, in the Alternative, Motion to Enforce Settlement Agreement, came on for hearing. The plaintiff failed to file an opposition or appear at the hearing. Having considered the defendant's written submissions and the oral argument of counsel, the Court hereby GRANTS the motion for the reasons set forth as follows.

Discussion

Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that he moving party entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court clarified the standard for summary judgment in three important cases. See Celotex Corporation v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." Anderson 477 U.S. at 256. A fact is material if it could affect the outcome of the suit under the governing substantive law. Id. at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof of trial, its burden must be satisfied by affirmative admissible

evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. See Celotex, 477 U.S. at 325.

When the moving party meets it burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. Id.

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be

drawn in its favor. Anderson, 477 U.S.at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)). The non-moving party must come forward with more than "the mere existence of a scintilla of evidence." Id. at 252. As the Court explained in Matsushita:

> " When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . Where the record taken as a whole could not lead a rational trier of facts to find for the nonmoving party, there is not "genuine issue for trial."
>
> 475 U.S. at 586-87.

The facts relied upon must be admissible under the rules governing the admission of evidence generally. Hal Roach Studios, Inc. v. Richard

Feiner and Co., Inc., 896 F.2d 1542 (9th Cir. 1990).

The plaintiff in this action failed to file a Statement of Genuine Issues, any controverting evidence, or an opposition to the motion. Local Rule 7.14.3 states the following:

> In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion.

The Court finds, pursuant to Local Rule 7.14.3, that the following facts are adequately supported and exist without controversy.

A. Jehan Zeb Mir, M.D., v. FHP, Inc., and Does 1 through 100, CV 94-6211 JGD (Kx)

On August 24, 1994, Jehan Zeb Mir, M.D. ('Mir") filed a First Amended Complaint for Damages for Refusal to Pay Medical Bills in the Superior Court of the State of California for the County of Los Angeles. Statement of Uncontroverted Facts ("S.U.F.") No. 1, Motion.

The First Amended Complaint alleged that on May 12, 1991, an individual by the name of Bernardino Ruedas ("Ruedas") was stabbed at a party in Long Beach, California. Exh. C, 12, Motion. Mir treated Ruedas as the surgeon on call in the emergency room of St. Francis Hospital in Lynwood, California. Ruedas, however, died from shock. Exh. C, 6, Motion. On May 21, 1991, Mir submitted a bill in the amount of $11,275 to

Ruedas' insurer, FHP, Inc., for the medical services he performed for Ruedas. Exh. C, 7, Motion.

The First Amended Complaint alleged three causes of action: (1) declaratory relief for the amount of medical fees due and owing (11,275); (2) breach of contract as between Ruedas and FHP; and (3) breach of the covenant of good faith and fair dealing as between Ruedas and FHP.

The second and third claims of the First Amended Complaint were based on the allegation that Ramiro Ruedas, as Representative of the Estate of Ruedas, "assigned all rights and privileges to the plaintiff to make a demand on the defendants for payment of his medical bills." Exh. C, 13, Motion.

On September 14, 1994, FHP removed the action to this Court. S.U.F. No.5, Motion. The action was assigned case number CV 94-6211 JGD (Kx). On January 11, 1995, FHP mailed Mir a request that all claims be dismissed on the ground that they were preempted by ERISA. S.U.F. No. 6, Motion.

On January 20, 1995, Mir's counsel advised FHP that Mir would represent himself pro se in the litigation. S.U.F. No. 10, Motion.

On February 7, 1995, FHP filed a Motion for Summary Judgment, which was scheduled for hearing on February 27, 1995. S.U.F. No. 11, Motion. On February 8, 1995, FHP and Mir held a Meeting of Counsel during which FHP again offered to settle the action for $5,500. S.U.F.

Nos.12, 13, Motion. On February 24, 1995, Mir filed a Motion to Remand the action to the Superior Court of the State of California. S.U.F. No. 14, Motion.

FHP deposed Mir on February 28, 1995. During the deposition, the parties discussed settlement. S.U.F. No. 15, Motion. Mir and FHP also discussed settlement during two telephone conversations that evening. As a result, the parties orally agreed to settle the case for $6,000, and to withdraw the motions for summary judgment and for remand. S.U.F. Nos. 16-18, Motion. FHP advised Mir that it would prepare the Settlement Agreement, Compromise and Mutual Release ("Settlement Agreement"). S.U.F. No. 19, Motion.

On March 3, 1995, FHP informed Mir that the company had endorsed a settlement check payable to him, and intended to forward a written Settlement Agreement to him for his signature. Agreement to Mir, and informed him that once he signed the Settlement Agreement and FHP received it, the company would send the $6,000 settlement check. S.U.F. Nos. 21, 22, Motion; Exh. B, Motion.

The Settlement Agreement is based on the First Amended Complaint in case number CV 94-6211 JGD (Kx). S.U.F. No. 23, Motion; Exh. B, Motion. Paragraph 4.01 of the Settlement Agreement drafted by FHP states:

> In consideration of a mutual waiver of costs, the bilateral execution of this

Agreement, and the payment of Six Thousand Dollars (6,000.00) to [Mir], [Mir] agrees to a full and final settlement of all actions against FHP, and shall dismiss, with prejudice, the entire Subject Action against FHP, which is the subject of this agreement.

S.U.F. No. 24, Motion; Exh. B, at 3, Motion.

On March 15, 1995, FHP and Mir signed the Stipulation to Take Plaintiff's Motion to Remand and Defendant's Motion for Summary Judgment Off Calendar ("Stipulation"). S.U.F. No. 25, Motion; Exh. B, Motion. The Stipulation stated:

It is hereby agreed and stipulated that Plaintiff Jehan Zeb Mir, M.D.'s Motion to Remand and Defendant FHP, Inc.'s Motion for

Summary Judgment currently scheduled to be heard on March 20, 1995, in Department 890 of the above entitled court, be taken off calendar as both parties have entered into settlement of action.

It is further stipulated that upon execution of the settlement documentation a dismissal of the action shall be promptly filed with the Court.

Exh. A, Motion.

On March 20, 1995, FHP contacted the Clerk of Court and requested that the pre-trial conference be taken off calendar because the parties had reach a settlement. S.U.F. No. 27, Motion.

On March 20,l 1995, FHP left a message with Mir's office requesting information regarding the

status of the Settlement Agreement, but Mir failed to return the phone call. S.U.F. No. 28, Motion. On March 23 and April 4, 1995, FHP sent letters to Mir, again requesting that he sign and return the Settlement Agreement. S.U.F. Nos.29, 30, Motion. On April 7, 1995, FHP telephoned Mir's office, but Mir did not return the call. S.U.F. No. 32, Motion. On April 10, 1995, FHP has Mir paged, but he did not respond. S.U.F. No. 33, Motion.

On April 10, 1995, the Court, nothing that FHP and Mir had failed to file a notice of dismissal, issued an Order dismissing the action, which stated that "the dispute has been settled, and thus the action is hereby dismissed without prejudice." S.U.F. No. 34, Motion; Exh. Q, Motion.

On April 11 and April 12, 1995, FHP called Mir's office to discuss the Settlement Agreement, but he did not respond. S.U.F. Nos. 35, 36, Motion. On April 18, 1995, FHP sent him a copy of the April 10, 1995 Court Order, again requesting that he sign the Settlement Agreement, and forward it so that FHP could release the $6,000 settlement check. S.U.F. No. 38, Motion; Exh. R, Motion.

On April 21, 1995, Mir sent FHP a letter stating:

> I have forwarded all of your correspondence in the above referenced matter to my attorney Robert Walker. Since the matter has been dismissed by the Federal Court, filing of substitution papers is irrelevant. Therefore, I suggest that you

contact Mr. Walker at the earliest.

Exh. S, Motion; S.U.F. No. 39, Motion.

On May 9, 1995, FHP sent a letter to Mir and his attorney expressing concern at the lack of response to the aforementioned communications regarding the Settlement Agreement. S.U.F. No. 40, Motion; Exh. T, Motion. On June 5, 1995, FHP called Mir's attorney, Robert Walker. He stated that he would review the file and discuss it with Mir. S.U.F. No. 41, Motion. On June 15, 1995, FHP sent another letter to Mir and Walker, again expressing concern about their failure to respond to FHP's attempts at communication with Mir. S.U.F. No. 42, Motion; Exh. U, Motion.

B. Jehan Zeb Mir, M.D., v. FHP, Inc., Ramiro Ruedas, and Does 1 through 50,

Inclusive, CV 95-7523 JGD (Shx)

On May 3, 1995, Mir filed a complaint for breach of contract against FHP in the Superior Court of the State of California for the County of Los Angeles. S.U.F. No. 44, Motion. Mir filed a First Amended Complaint for Damages in the same action on September 29, 1995. S.U.F. No. 45, Motion.

The First Amended Complaint alleges that, on May 12, 1991, Ruedas was stabbed at a party in Long Beach, California. First Amended Complaint 9, Motion. Emergency room personnel summoned Mir, who performed emergency surgery on Ruedas at St. Francis Hospital in Lynwood, California, but the surgery was unsuccessful and Ruedas died. First Amended Complaint 9, Motion. On May 5,

1991, Mir submitted a bill in the amount of $11,275.00 to FHP for the services rendered to Ruedas. First Amended Complaint 10, Motion.

The First Amended Complaint alleges three claims for damages. The first claim alleges that Mir was damaged in the amount of $11,275 because FHP breached its duty to Ruedas by failing to pay Mir (a third-party beneficiary of the insurance contract between Mir and FHP) for the medical services he provided to Ruedas. First Amended Complaint 10-13, Motion. The First Amended claim alleges that FHP misrepresented to Mir that FHP would pay for the medical services he provided to Ruedas. First Amended Complaint 17, Motion. The third claim alleges that FHP violated the "1975 Act dealing with the time for

and the manner of payments made to third-party health care providers." First Amended Complaint 25, Motion.

On November 3, 1995, FHP removed the First Amended Complaint to this Court. The action was assigned case number 95-7523 JGD (Shx). On November 13, 1995, FHP filed a Counterclaim for Breach of Settlement Agreement against Mir. The Counterclaim alleged that Mir breached the oral settlement agreement by (1) failing to execute the written Settlement Agreement, (2) failing to dismiss the action upon which the settlement was based, and (3) filing the First Amended Complaint and its original version in the Superior Court of the State of California. On December 19, 1995, the

Clerk of Court entered default against Mir on the Counterclaim.

On May 24, 1996, FHP filed a Motion for Summary Judgment; or in the Alternative, Motion to Enforce Settlement Agreement. FHP moves for summary judgment on the First Amended Complaint and on the Counterclaim in the present action, case number 95-7523 JGD (Shx).

FHP moves for summary judgment on the following grounds. Mir is barred from re-litigating this action because it was settled pursuant to a binding settlement agreement. Such attempts constitute a breach of the agreement. Additionally, Mir's failure to execute the written settlement agreement in accordance with the terms of the oral settlement agreement constitute a breach of the

oral agreement. In support of the motion, FHP offers proof that there exists an oral agreement, evidenced in writing, between FHP and Mir to settle all claims relating to the medical services Mir performed on May 12, 1991. Motion, at 1. Such evidence of the oral agreement includes the unexecuted written settlement agreement and the Stipulation. See Mahboob v. Department of Navy, 928 F.2d 1126, 1128-30 (Fed. Cir. 1991) (an oral settlement agreement may constitute a binding contract); Scheuler v. Roman Asphalt Corp., 827 F. Supp. 247, 259 (S.D.N.Y. 1993) ("Enforcement of settlements of litigation is customarily based upon client signature, stipulation so-ordered by the

court, or stipulations entered into between counsel on the record.").

Mir fails to demonstrate the existence of any genuine issues regarding the existence of a binding settlement agreement barring relitigation of the claims in this action, the defendants are entitled to summary judgment on all causes of action in the First Amended Complaint, and on the Counterclaim.

Accordingly, the motion for summary judgment on the First Amended Complaint and the Counterclaim is GRANTED in the present action, case number 95-7523 JGD (Shx). Because there is no evidence that defendant Ramiro Ruedas has been served in the action, a final judgment will be entered. See Patchick v. Kensington Publishing

Corp., 743 F.2d 675, 676-77 (9th Cir. 1984);

Insinga v. LaBella, 817 F.2d 1469, 1470 (11th Cir. 1987).

IT IS SO ORDERED. JOHN G. DAVIES
United States District Court

No. 98-1772

IN THE

Supreme Court of the United States

JEHAN ZEB MIR, M.D.,

Petitioner,

v.

FHP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a conflict between the Circuit Courts, as to the processing of Federal Rules of Civil Procedure, Rule 60(b) motions during the pendancy of an appeal?

STATEMENT PURSUANT TO RULE 29.6

The following parent companies, subsidiaries and affiliates of Respondent FHP, Inc., have issued shares to the public:

a. PacificCare, Inc.

b. PacificCare Health Systems, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Summary of Argument	1
Statement of the Case	2
A. The Ninth Circuit Procedurally Processed MIR's Request For Rule 60 Relief In A Manner Substantially Similar To That Employed By Other Circuits	6
B. The District Court Cannot Grant A Rule 60(b) Motion, While An Appeal Is Pending, Without An Appellate Remand	10
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Aldrich Ent. Inc. v. United States, 938 F.2d 1134 (10th Cir. 1991) 7

Brown v. United States, 976 F.2d 1104 (7th Cir. 1992) 7

Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39 (1st Cir. 1979) 6, 7

First Nat. Bk. of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976) 7

Hoai v. Vo, 935 F.2d 308 (D.C. Cir. 1991) 7

Pioneer Insurance Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977) 7

Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976) .10, 11, 13, 14

Stein v. Wood, 127 F.3d 1187 (9th Cir. 1997) ..11, 12, 13

Stone v. I.N.S., 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) 13, 14

Toliver v. County of Sullivan, 957 F.2d 47 (2nd Cir. 1992) 7

Cited Authorities

	Page
Travelers Ins. Co. v. Liljeberg, Inc., 38 F.3d 1404 (5th Cir. 1994)	7
United States v. Acc. Nos. 3034504504 and 144-07143, 971 F.2d 974 (3rd Cir. 1992)	7
Wilkin v. Sunbeam Corp., 405 F.2d 165 (10th Cir. 1968)	14
Statutes:	
29 U.S.C. §§ 1001-1461	2
Rules:	
Federal Rules of Civil Procedure 23	12
Federal Rule of Civil Procedure 60(b)	*passim*
Other Authorities:	
12 Moore's Federal Practice, 60.67[2][c] (Matthew Bender, 3rd Edition)	8
11 *Wright & Miller*, Federal Practice & Procedure, Section 2873 (1994 Supp.)	14

TABLE OF APPENDICES

Page

Appendix A — Notice Of Appeal Dated March 18, 1997 And Filed March 19, 1997 ..... 1a

SUMMARY OF ARGUMENT

The Writ should be denied for the following reasons:

1. There is no substantive conflict, between the Circuits, as to the processing of Federal Rules of Civil Procedure, Rule 60(b) motions filed more than ten days after the entry of an order that is being reviewed on appeal.

2. The District Court effectively reviewed and denied Petitioner's request for relief, under Rule 60(b), on the merits. Thus, Petitioner was treated similar to litigants in other Circuits when the District Court notified him that he had not stated any grounds "that would justify the extraordinary relief requested". (App. E:2; all Appendix references are to the Appendix attached to Mir's Petition unless indicated otherwise).

3. The District Court did not have authority to grant a Rule 60(b) motion, during the pendancy of an appeal, without a remand from the Appellate Court.

4. The Petition is meritless because the District Court held that Petitioner had failed to state sufficient reasons for the granting of Rule 60(b) relief. Hence, the relief was denied after a review on the merits. It is therefore irrelevant as to whether the District Court had the power to grant the requested relief as it concluded that Petitioner had failed to establish an entitlement thereto.

5. Petitioner never filed a Notice of Appeal from the District Court's Order denying Petitioner's "Motion To Grant Hearing On Rule 60(b) Motion".

STATEMENT OF THE CASE

As of May 12, 1991, Bernardino Ruedas was covered by an employee health care group plan administered by FHP, Inc. (App. A:2 and G:6). Mr. Ruedas was stabbed while at a party in Long Beach, California and thereafter treated by Petitioner JEHAN ZEB MIR, M.D. (hereinafter "MIR") at St. Francis Hospital's Emergency Room in Lynwood, California (App. G:7). Mr. Ruedas died while under Petitioner's medical care and MIR thereafter excessively billed FHP $11,275 for emergency medical services (App. G:7 and G:8). FHP contested these fees as unreasonable and excessive. On August 25, 1994, MIR filed a First Amended Complaint, against FHP, in the Los Angeles County Superior Court (hereinafter "MIR #1") (App. G:7).

On September 14, 1994, FHP removed MIR #1 to the United States District Court for the Central District of California (App. G:9). The basis for the removal was preemption by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA") (App. A:1 and G:9). The action was thereafter litigated by the parties. On January 11, 1995, FHP requested that MIR dismiss all claims on the grounds of ERISA preemption (App. G:9). On January 19, 1995, FHP offered to settle for $5,500 even though the claims were preempted by ERISA (App. F:4). Petitioner, a hardheaded individual, refused to compromise his excessive billings and instead demanded full payment together with interest thereon (App. F:4). On January 20, 1995, after MIR had rejected FHP's settlement offer, MIR's counsel withdrew and Petitioner then represented himself (App. F:4).

FHP filed a motion for summary judgment on February 7, 1995, and, on February 8, 1995, again offered to compromise for $5,500 (App. F:4-5). MIR then filed an untimely motion for remand on February 24, 1995 (App. F:4-5). After further settlement discussions, MIR verbally agreed to settle for $6,000 (App. F:5). The oral agreement was to be reduced into a written form (App. F:4-9). FHP then sent the written settlement agreement to MIR on March 14, 1995, and confirmed that the $6,000 would be sent, as agreed, once the agreement was signed (App. F:6).

On March 15, 1995, MIR and FHP signed a Stipulation taking their two motions off calendar because " 'the parties have entered into a settlement of this dispute. . . .' " (App. F:6-7). The District Court then dismissed MIR #1 on April 10, 1995 (App. F:8). On or before April 21, 1995, MIR retained attorney Robert Walker to negotiate a better deal. Between March 14, 1995 and June 15, 1995, FHP repeatedly contacted MIR and his new counsel, Robert Walker, and inquired as to when the settlement agreement would be signed (App. F:5-9). During this time, neither MIR nor attorney Walker notified FHP that MIR wanted to re-negotiate.

On May 3, 1995, MIR secretly filed a second action, against FHP, in the Los Angeles County Superior Court (hereinafter "MIR #2"). The original complaint was not served on FHP (Petition, Page 8). MIR #2 sought to recover the same damages already settled in MIR #1 (App. F:10-11). MIR filed a First Amended Complaint, in MIR #2, and served same in October of 1995 (App. F:10-11 and Petition, Page 8). FHP again removed the action to the United States District Court on November 3, 1995 (App. F:11).

On November 13,1995, FHP filed a counterclaim against MIR based upon his irrational breach of the settlement (App. F:11-12). The counterclaim alleged MIR had breached the settlement by (1) refusing to execute the written settlement agreement; (2) failing to dismiss MIR #1; and (3) filing MIR #2 (App. F:11-12). The damages sought by FHP included compensatory damages, attorney's fees, interest and costs (App. F:12). No answer was filed in the counterclaim and a default was entered, against MIR, on December 19, 1995 (App. F:12-13).

FHP filed a motion for summary judgment, in MIR #2, on May 24, 1996 and a hearing was set for June 17, 1996 (App F:13). The motion for summary judgment was deliberately not opposed although both MIR and his attorney admittedly knew about, and discussed, the motion (App. F:14 and F:19-23). On June 14, 1996, FHP's counsel, Francis M. Drelling, verbally discussed the summary judgment motion with MIR's counsel, attorney Walker (App. F:21). During this discussion, attorney Drelling notified attorney Walker the motion was proceeding forward (App. F:21). It was also on June 14, 1996, that attorney Drelling, via facsimile and U.S. mail, sent a letter to attorney Walker confirming their conversation (App. F:21). Neither attorney Walker, nor Petitioner, appeared at the summary judgment hearing (App. F:14 and F:21-22). The District Court then properly granted summary judgment to FHP (App. F:14, 15).

FHP thereafter filed a motion to recover its legal fees in the sum of $19,491.25 (App. F:1-24). FHP's motion was granted and it was awarded $19,491.25 (App. F:1-24). The District Court's Order granting FHP's attorney fee motion was entered on February 19, 1997. On March 19, 1997, MIR

filed a Notice of Appeal "from the summary judgment and amended judgment . . ." (FHP's Appendix A at 2a — attached hereto).

On April 18, 1997, MIR filed a "Motion to Grant Hearing on Rule 60 Motion" (App. E:1 and Petition, Page 9). In ruling on the Motion, the District Court stated, "[t]he motion is Denied. The Court no longer has jurisdiction over the case. No grounds are stated that would justify the extraordinary relief requested." (App. E:2). MIR never filed a notice of appeal as to this ruling. Petitioner next requested the Ninth Circuit Court of Appeals to remand the case so MIR could proceed with a Rule 60(b) motion (Petition, Page 10). The Appellate Court denied the application without prejudice to refiling same with proof that the District Court desired to consider such a motion (App. C:2). MIR never again sought to provide additional facts to the District Court as to a Rule 60(b) motion. Instead, MIR sought a clarification of the Appellate Court's denial (App. D:2). MIR's request was denied, with a notation that the case was ready for calendaring (App. D:2).

The Ninth Circuit Court of Appeals thereafter affirmed the District Court's entry of judgment, the award of attorney's fees and the denial of MIR's Rule 60(b) request (App. A:1-7). MIR now seeks a review of the District Court's Order denying his request for a "hearing" on a Rule 60(b) motion.

Finally, FHP notes that MIR's Petition improperly contains a number of factual misrepresentations and that it repeatedly relies upon disputed facts never established before any of the lower courts. FHP will not attempt to point out all of the inaccuracies as they have no bearing on the

limited legal issue now pending. FHP will, however, briefly respond to a few of the Petitioner's misrepresentations. Firstly, Petitioner falsely claims that FHP refuses to pay him the $6,000 that he is to receive pursuant to the settlement. The truth is that FHP literally sent MIR the $6,000 settlement check but he refused to cash it and physically returned it to FHP's counsel. Although beyond the record, the presentation, and knowing rejection, of the settlement funds can be proven by documentary evidence. Secondly, FHP did not unilaterally notify the District Court of the settlement. FHP and MIR jointly notified the court of the settlement (App. F:6-7). Thirdly, Petitioner is not a blameless lamb being victimized by FHP and/or the judicial system. Rather, Petitioner is a highly seasoned litigator that abuses the system at every opportunity. In fact, it is MIR's meritless legal maneuvers that are causing FHP to incur unnecessary legal fees in a sum now exceeding $40,000 with no end in sight.

A. The Ninth Circuit Procedurally Processed MIR's Request For Rule 60(b) Relief In A Manner Substantially Similar To That Employed By Other Circuits

The keystone to Petitioner's argument is that there is a conflict between the Circuits as to the manner in which requests for Rule 60(b) relief are processed. MIR's petition essentially argues that all Circuits, except the Ninth Circuit, allow the District Court to hold hearings on, and thereafter grant, Rule 60(b) motions even though (a) there is an appeal pending; and (b) the Rule 60(b) motion was filed more than ten days after the order being appealed. MIR supports this assertion by citing, without further comment, to a number of cases: *Commonwealth of Puerto Rico v. SS Zoe*

Colocotroni, 601 F.2d 39 (1st Cir. 1979); *Toliver v. County of Sullivan*, 957 F.2d 47 (2nd Cir. 1992); *United States v. Acc. Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3rd Cir. 1992); *Travelers Ins. Co. v. Liljeberg, Inc.*, 38 F.3d 1404 (5th Cir. 1994); *First Nat. Bk. of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976); *Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992); *Pioneer Insurance Co. v. Gelt*, 558 F.2d 1303 (8th Cir. 1977); *Aldrich Ent. Inc. v. United States*, 938 F.2d 1134 (10th Cir. 1991); and *Hoai v. Vo*, 935 F.2d 308 (D.C. Cir. 1991).

A review of Petitioner's cases reveals that they do not state that (a) litigants are somehow entitled to "hearings" on Rule 60(b) motions during the pendancy of an appeal; and (b) District Courts can grant rule 60(b) relief, while an appeal is pending, without the need for a remand. They do, however, contain statements of law providing that (1) the District Court has jurisdiction to deny, but not grant, a Rule 60(b) motion during the pendancy of an appeal; and (2) if the District Court is inclined to grant a Rule 60(b) motion, then it is free to so indicate and an appellate remand can thereafter be obtained. *See, e.g., First Nat. Bank of Salem v. Hirsch*, 535 F.2d at 345 n.1 (appeal transfers jurisdiction to appellate court); *Brown v. United States*, 976 F.2d at 1110-1111 (appellate remand necessary in order to grant 60(b) relief while appeal pending); *Pioneer Ins. Co. v. Gelt*, 558 F.2d at 1311-12 (remand necessary prior to trial court's grant of Rule 60(b) motion during appeal); and *Aldrich Ent. Inc. v. United States*, 938 F.2d at 1143 (trial court lacks jurisdiction to grant 60(b) relief, during appeal, without remand). Hence, even Petitioner's authorities provide that an appellate remand is necessary before a District Court can grant Rule 60(b) relief once an appeal has been filed.

The Ninth Circuit simply holds that District Courts have no jurisdiction to rule on a Rule 60(b) motion, during an appeal, and that litigants should first obtain an appellate remand once the District Court has expressed an interest in granting relief. The Ninth Circuit's procedure is thus substantially similar to that used by the other Circuits. The Ninth Circuit's procedure is described by 12 Moore's Federal Practice, 60.67[2][c] (Matthew Bender, 3rd Edition):

> . . . in the Ninth Circuit, the approved procedure is closer to the current procedure in the remaining circuits . . . than to the old rule that appellate court permission was needed before any action could take place in the District Court. The proper Ninth Circuit procedure is to . . . "ask the District Court whether it wishes to entertain the motion, or to grant it, and then move . . . [the appellate] court . . . for remand of the case." This "asking" the District Court if it wants to grant the motion does not seem to be so different than simply allowing the District Court to consider and possibly deny the motion on its merits, and requesting a remand only when the District Court indicates a desire to grant the motion.

Thus, the Ninth Circuit simply has the litigants inquire if the District Court would favorably consider a Rule 60(b) motion. If the response is in the affirmative, then the movant can proceed to request a remand from the Appellate Court. The Ninth Circuit's procedure is therefore similar to the other Circuits as the court is free to deny the request and this is substantially the same as denying the motion. Furthermore, the requesting of an remand is the same manner in which litigants in other Circuits obtain Rule 60(b)

relief during the pendancy of an appeal. Thus, there is no substantive conflict between the Circuits as to the processing of requests for relief under Rule 60(b).

In this instance, MIR filed a motion, in the District Court, wherein he requested the court to "grant hearing on Rule 60 motion." This motion was supported by a declaration and a legal memorandum. The District Court substantively reviewed the motion and issued an order in compliance with proper procedure (App. E:1-2). Firstly, the Order indicated that the District Court lacked jurisdiction due to the pendancy of the appeal. Secondly, the District Court ruled "no grounds are stated that would justify the extraordinary relief requested." (App. E:2).

The District Court's statement that Petitioner had failed to present sufficient grounds to support Rule 60(b) relief confirms that the court did consider Petitioner's request on the merits. The fact that MIR did not entitle his request as a "motion for Rule 60(b) relief" is meaningless. In other words, the title of the motion (i.e., "To Grant Hearing On Rule 60(b) Motion" instead of "Motion for Relief") is a distinction without a meaning. The fact is that the District Court did review the reasons proffered in support of granting Rule 60(b) relief. It is a further fact that the District Court decided that Petitioner's facts did not support the granting of relief. Thus, Petitioner's request was treated similar to those made by litigants in other Circuits. The fact that the District Court's ruling came via a "Motion To Grant Hearing on Rule 60 Motion" instead of a "Motion For Relief" is irrelevant.

Based upon the foregoing, the Writ should be denied as there is no conflict between the Circuits.

B. The District Court Cannot Grant A Rule 60(b) Motion, While An Appeal Is Pending, Without An Appellate Remand

As noted above, the District Court's Order reveals that Petitioner's request for Rule 60(b) relief was reviewed and denied, on the *merits* (App. E:2). The ability of the District Court to grant Rule 60(b) relief, during the pendancy of an appeal, is therefore irrelevant as the request was considered and denied. MIR's Petition is nothing but an abusive last ditch effort to delay the consequences of his bad faith breach of the settlement agreement. Nevertheless, FHP will now address the assertion that District Courts have jurisdiction to grant Rule 60(b) relief, during the pendancy of an appeal, without the need for an appellate remand.

As discussed in the prior section, Petitioner himself cites a number of Circuit Court cases stating that the District Court can deny, but not grant, a Rule 60(b) motion during an appeal. These cases further support the proposition that a District Court can only grant a Rule 60(b) motion if the Appellate Court first remands the case. These cases therefore contradict Petitioner's assertion that a District Court has authority to grant Rule 60(b) relief without regard to the pendancy of an appeal.

Petitioner relies, at least in part, upon *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976) in claiming that the pendancy of an appeal does not prevent a District Court from granting Rule 60(b) relief. This reliance is based upon a fundamental misunderstanding of *Standard Oil*.

Standard Oil is of no value to Petitioner because it simply provides that a District Court can rule on a Rule 60(b) motion once an appeal has been concluded and the mandate issued. It does not state that a District Court can grant, or even deny, a Rule 60(b) motion without regard to the pendancy of an appeal. Thus, Petitioner is mistaken in his reliance upon *Standard Oil.*

Petitioner also relies on the case of *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997) for his assertion that the pendancy of an appeal does not affect a District Court's ability to grant Rule 60(b) relief. Although *Stein* does contain the referenced dicta, it is not helpful to Petitioner for a number of reasons.

Stein is a procedurally complex criminal case where the Defendant, Mr. Stein, was convicted of several crimes in a Washington state court. Mr. Stein then filed a *habeas petition* with the District Court. The District Court determined that Mr. Stein was unconstitutionally denied his state appellate rights. The District Court ordered his release only if the state did not reinstate his appellate rights within 90 days. Mr. Stein then filed a notice of appeal as to other aspects of the District Court's rulings. While the appeal was still pending, Mr. Stein filed a motion, in the District Court, seeking his immediate release. The District Court dismissed the motion due to a lack of jurisdiction.

The issue in the *Stein* appeal was whether the District Court had been divested of jurisdiction to rule on the defendant's motion for release simply because Mr. Stein had appealed other unrelated aspects of the District Court's ruling. In deciding this issue, the Appellate Court noted the general rule that "the filing of a notice of appeal divests a

District Court of jurisdiction over those aspects of the case involved the appeal [citations omitted]." *Id.* at 1189. The Appellate Court further acknowledged:

> The rationale for this general rule is that it avoids "the confusion and waste of time that might flow from putting the same issues before two courts at the same time" [citation omitted]. This general rule is thus a rule of judicial economy. It does not rest on a statute and "should not be employed to defeat its purposes nor to induce needless paper shuffling" [citation omitted].

Id.

After observing the foregoing, the *Stein* court then concluded that the District Court still had jurisdiction to consider Mr. Stein's motion because (1) the motion involved issues not placed before the Appellate Court, (2) the District Court would only be "deciding whether a condition placed on a habeas petitioner's custody has been met," and (3) the "plain language of Rule 23 gives the District Court jurisdiction concurrent with the Appeals Court over the custody of a habeas petitioner." *Id.* at 1190.

Stein does not help Petitioner for a variety of reasons. Firstly, Stein involved Rule 23 of the Federal Rules of Civil Procedure, wherein the District Court is specifically granted jurisdiction even in the event an appeal is filed. Presently, Rule 60(b) does not grant jurisdiction to a District Court while an appeal is pending. Secondly, *Stein* did not involve circumstances wherein the Petitioner was simultaneously seeking to litigate intertwined issues before two courts. Here, the Petitioner was attempting to overturn the summary

judgment both via the District Court (motion for relief) and the appellate court (appeal of summary judgment).

A third reason as to why *Stein* is not helpful to Petitioner is because Petitioner does not understand *Stein*'s dicta reference to Rule 60(b). Specifically, *Stein*, 127 F.3d at 1189 cites *Stone v. I.N.S.*, 514 U.S. 386, 401-02, 115 S. Ct. 1537, 1547-48, 131 L. Ed. 2d 465 (1995) for the parenthetical statement that "District Courts retain jurisdiction to decide Rule 60(b) motions even after an appeal is taken." Petitioner's mistaken reliance upon this dicta becomes apparent once *Stone* and the authority cited therein are reviewed.

Stone involved circumstances where the Petitioner, Mr. Stone, was seeking to avoid deportation. An administrative judge ordered that he be deported. The Board of Immigration Appeals ("BIA") affirmed the deportation order on July 26, 1991. In August, 1991, Mr. Stone sought a reconsideration of the deportation order and filed a motion for reconsideration. The BIA denied the motion on February 3, 1993. Mr. Stone thereafter petitioned to have the Court of Appeals review the original order as well as the denial of the reconsideration motion.

The *Stone* Appellate Court held that the ninety day period in which to file a reconsideration motion had not tolled the time in which Mr. Stone had to appeal the deportation order. The Court of Appeals thus dismissed Mr. Stone's Petition for want of jurisdiction as it was untimely to the extent it sought review of the July 26, 1991 order.

For reasons not here relevant, the United States Supreme Court affirmed the *Stone* Court of Appeals. As a part of reaching this ruling, the Supreme Court cited *Standard*

Oil Co. of Cal. v. United States, 429 U.S. at 18-19 as well as *11 Wright & Miller*, Federal Practice & Procedure, Section 2873 (1994 Supp.) for the dicta statement that the "pendancy of an appeal does not affect the District Court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. at 401. However, neither *Standard Oil* nor the *Wright & Miller* authority stand for the stated dicta.

As clarified above, *Standard Oil* only applies to Rule 60 motions filed after the appeal has been completed and the appellate mandate issued. Furthermore, the current version of Section 2873, contained within *Wright & Miller*, does not state that District Courts have unfettered jurisdiction to rule on Rule 60(b) motions during the pendancy of an appeal, without the need for a remand. Rather, Section 2873 actually states that a number of cases hold that, during the pendancy of an appeal, the District Court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, then application can be made to the Appellate Court for a remand. At most, Section 2873 cites *Wilkin v. Sunbeam Corp.*, 405 F.2d 165 (10th Cir. 1968) for the proposition that no appellate leave is necessary, as to a Rule 60(b) motion, after an appeal has been concluded. Thus, even the reference to *Wilkin* does not aid Petitioner as it is in accord with *Standard Oil*. As such, neither *Standard Oil* nor *11 Wright and Miller*, Federal Practice & Procedure, Section 2873 stand for the dicta contained within *Stone*.

Based upon the foregoing, the District Court could not have granted a Rule 60(b) motion without a remand from the Appellate Court. Even if a remand was not necessary, this entire issue is moot because the District Court reviewed Petitioner's reasons for requesting relief and determined that relief should be denied. Accordingly, the District Court effectively denied Petitioner's request on the merits and it is thus irrelevant as to whether the District Court even had the authority to grant relief.

CONCLUSION

In summary, the writ should be denied for a number of reasons. Firstly, there is no conflict between the Circuits as to the processing of Rule 60(b) motions during the pendancy of an appeal. Secondly, Petitioner's request for Rule 60(b) relief was processed in a manner substantially consistent with other Circuits. Thirdly, Petitioner's request was denied on the merits due to a lack of supporting facts. Fourthly, it is irrelevant as to whether the District Court could have granted Rule 60(b) relief without an appellate remand because the District Court actually denied, on the merits, Petitioner's request for relief. Fifthly, Petitioner never even appealed from the District Court's denial of Rule 60(b) relief.

Respectfully submitted,

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APPENDIX A — NOTICE OF APPEAL DATED MARCH 18, 1997 AND FILED MARCH 19, 1997

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Pro se

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No.: CV 95-7523 JGD (SHx)
Judge Davies

JEHAN ZEB MIR, M.D.

Plaintiff/cross defendant

v.

FHP, Inc., a corporation, RAMIRO RUEDAS, an individual, and DOES 1 through 50, inclusive,

Defendants/cross claimant

NOTICE OF APPEAL

Notice is hereby given that JEHAN ZEB MIR, M.D. plaintiff and cross defendant in the above named case, hereby appeals to the United States Court of Appeals for

the Ninth Circuit from the Summary Judgment and Amended Judgment entered in this action on the 19th day of February, 1997. The appellant, however, intends to file a motion under Rule 60, to set aside the said Summary Judgment.

Signed Jehan Zeb Mir, M.D.
JEHAN ZEB MIR, M.D.
Pro se

Date: 03/18/97

(3)

Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

No. 98-1772

In The

Supreme Court of the United States

JEHAN ZEB MIR, MD,

Petitioner,

v.

FHP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioner Pro Se

3288

TABLE OF CONTENTS

Page

Objections to Respondent's Statement of the Case.. 1

The Respondent offers Contradictory Arguments That Ninth Circuit Court Procedurally Processed Mir's Request for Hearing on a Rule 60(b) Motion Substantially Similar to Other Circuit Courts And That District Court Could Not Grant a Rule 60(b) Motion Pending Appeal And Absent Appellate Remand..... 3

Respondent Waived Right To Contest A Frivolous Unpreserved Issue..... 8

Petitioner Presents Additional Jurisdictional Question For Grant of Certiorari 9

Conclusions 10

TABLE OF APPENDICES

Page

Appendix H Plaintiff's Reply to Defendant's Opposition To Motion To Grant Hearing On Rule 60(b) Motion Dated May 5, 1997.....App. 1

Appendix I Declaration of Jehan Zeb Mir, MD In Support of Motion To Grant Hearing on Rule 60 Motion Dated April 18, 1997 .....App. 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aldridge Enterprises, Inc. v. United States, 938 F.2d 1134 (10th Cir. 1991) 4

Brown v. United States, 976 F.2d 1104 (7th Cir. 1992) 4

Commonwealth of Puerto Rico v. SS Colocotrani, 601 F.2d 39 (1st Cir.) 3

First National Bank Of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976) 4

Hoai v. Vo, 935 F.2d 308 (D.C. Cir. 1991) 5

Meadow v. Employer Health Insurance, 47 F.3d 1006 (9th Cir. 1995) 6

Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977) 4

Ryan v. United States Line Co., 303 F.2d 47 (2nd Cir. 1992) 3

Simon v. Gorsuch, 715 F.2d 1248 (7th Cir. 1983) 4

Stein v. Wood, 127 F.3d 1187 (9th Cir. Niv. 1997) 7

Toliver v. County of Sullivan, 957 F.2d 47 (2nd Cir. 1992) 3

Townsend v. Holmes Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 6

Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994) 4

United States v. Accounts Nos. 303450454 & 144-07143, 971 F.2d 974 (3d Cir. 1992) 3

In Re: Wolf, 842 F.2d 464 (D.C. Cir. 1988) 9

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES SUPREME COURT CASES

Izumi Seimitsu Kogyo Ksbushiki Kaisha v. United States Philip Corp., 126 L. Ed. 2d 396, 62 USLW 4007, 1993-2 CCH Trade Cases # 70428, 7 FLW Fed S. 661 (1993 U.S.) 9, 10

Mishkin v. New York, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, *reh. den.*, 384 U.S. 934, 16 L. Ed. 2d 535, 86 S Ct. 1440 (1966) 8

Stone v. I.N.S., 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) 7, 8, 9

Tyrrell v. District of Columbia, 243 U.S. 1, 61 L. Ed. 557, 37 S. Ct. 361 (1917) 8

RULES

Federal Rules of Civil Procedure 41(a)(1)(ii) 9

Federal Rules of Civil Procedure Rule 60(b) ..... *passim*

Local District Court Rule 2.10 2

OTHER AUTHORITIES

Moore's Federal Practice, 60.67[2][c] 60-209-210 (Mathew Bender, 3rd Edition) 3, 5

Wright & Miller, Federal Practice & Procedure 8, 9

OBJECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

Relevant misstated facts are as follows:

The emergency surgical fees were not denied because the fees were unreasonable and excessive. FHP, Inc. fraudulently denied the entire amount of the claim on the sole grounds that the surgery was allegedly performed on a dead patient.

FHP, Inc. had defrauded the Petitioner on other occasions. Simultaneously, according to the Los Angeles Times, FHP, Inc. was indicted by the Department of Justice on more than one hundred counts of defrauding Medicare.

Respondent has described the Petitioner as a "hard headed individual" because Petitioner would not submit to its bogus Counter Claim and excessively billed Claim for attorney fees. Petitioner proved to the Court of Appeals that attorneys for the Respondent in their billings records had charged for legal services which were never rendered.

For example, attorney Moore charged $387.50 for travel to and from Los Angeles for hearing on Rule 60(b) motion; prepare Notice of Ruling, while the evidence on the record showed that Judge Davies took the matter under submission on May 8, 1997, denied the motion on the same day, prepared and issued order. Petitioner will have to pay for this bill, if the judgment is allowed to stand.

It's a matter of common observation that in a street quarrel, the person with a poor or no argument is usually more abusive.

MIR never knew about any of the proceedings in the District Court till he was served with the Order for Judgment for Attorney's Fees. (Appendix I)

Respondent's attorneys secretively notified the District Court that the case had been settled. After receiving Order for Judgment, Petitioner could not contact his attorney and on March 4, 1997, had to review his district court file and discovered a letter from FHP, Inc. attorney James Jackson to Judge Davies, dated March 20, 1995, informing him that the case had been settled.

On March 11, 1997 the Petitioner returned to district court to make copies and found that the March 20, 1997 letter was missing and there were some loose pages in the file. The file was intact when it was returned to the Court Clerk on March 4, 1997.

Petitioner immediately contacted the Respondent's attorney by phone and by letter to demand a copy of the letter. FHP, Inc. attorney Joey Moore wrote that he did not have March 20, 1995 letter, even though in his declaration in support of Summary Judgment Motion, he had testified that on March 20, 1995, the District Court was informed of the settlement. This direct personal communication was in violation of Local Court Rule, 2.10, which prohibits communications with the judge by letter or person in the absence of the opposing party.

If MIR had breached the oral agreement, the Respondent's attorneys should have moved the District Court in March 1995, to enforce the breach of the Oral Agreement. They did not, instead they had the case secretively dismissed.

THE RESPONDENT OFFERS CONTRADICTORY ARGUMENTS THAT NINTH CIRCUIT COURT PROCEDURALLY PROCESSED MIR'S REQUEST FOR HEARING ON A RULE 60(b) MOTION SUBSTANTIALLY SIMILAR TO OTHER CIRCUIT COURTS AND THAT DISTRICT COURT COULD NOT GRANT A RULE 60(b) MOTION PENDING APPEAL AND ABSENT APPELLATE REMAND

The procedures employed in the other Circuit Courts grant an unrestricted right of the movant for relief under Rule 60(b) after Notice of Appeal is filed as follows (Moore's Federal Practice, 60.67[2][c] (Mathew Bender, 3rd Edition)):

1st Circuit "When an appeal is pending . . . , parties may file a Rule 60(b) motion directly in the district court without seeking prior leave from us. The district court is directed to review such motions expeditiously. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979).

2d Circuit "For proposition that 'district court can entertain and deny the rule 60(b) motion; however,' if [district court] decides in favor of it, then and only then is the necessary remand by the court of appeals to be sought" *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992); (citing *Ryan v. United States Line Co.*, 303 F.2d 430, 434 (2d Cir. 1962)

3d Circuit "The filing of a notice of appeal does not divest a district court of jurisdiction to entertain Rule 60(b) motion" *United States v. Accounts No. 3034504504 & 144-07143*, 971 F.2d 974, 988 (3d Cir. 1992).

5th Circuit "Our court recognizes. . . . " the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal. . . . When the district court is inclined to grant the Rule 60(b) motion, however, then it is necessary to obtain the leave of the court of

appeals. "*Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994).

6th Circuit "The party seeking to file a Rule 60(b) motion . . . should have filed that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First National Bank of Salem v. Hirsch*, 535 F.2d 343, 346 & n.2 (6th Cir. 1976).

7th Circuit "Parties may file motions under Rule 60(b) in the district court while an appeal is pending. In such circumstances we have directed district courts to review such motions promptly, and either that we may order a speedy remand. "*Brown v. United States*, 976 F.2d 1104, 1110-1111 (7th Cir. 1992).

7th Circuit "A district court has jurisdiction to consider and deny Rule 60(b) motions during the pendency of an appeal" *Simon v. Gorsuch*, 715 F.2d 1248, 1252 (7th Cir. 1983).

8th Circuit "During the pendency of an appeal . . . the district court has jurisdiction to consider the motion and if it finds the motion to be without merit to enter an order denying the motion, from which an appeal may be taken. If on the other hand, the district court decides that the motion should be granted, the counsel for the movant should request the court of appeal to remand." *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977).

10th Circuit "Although it lacked jurisdiction to grant the Rule 60(b) motion due to the appeal . . . , the court was free to consider and the court could then either deny upon *merits* or the court could have notified us of its intention to grant the motion upon proper remand." *Aldrich Enterprises, Inc. v. United States*, 938 F.2d 1134 (10th Cir. 1991).

D.C. Circuit "When both a Rule 60(b) motion and an appeal are pending simultaneously . . . the District Court may consider the Rule 60(b) motion and, if the District

Court indicates that it will grant relief, the appellant may move the appellate court for a remand." *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991).

It is clear from the foregoing that even though there is slight disagreement within the circuits whether or not the district court has jurisdiction pending appeal, all of the Circuit Courts provide that the district court could freely grant a Rule 60(b) motion during pendency of appeal.

The issue of remand is totally irrelevant in these Circuit Courts for consideration of Rule 60(b) motion. If the district court does not grant a Rule 60(b) motion, the appeal process can continue on the rest of the issues without the unnecessary step of remand.

The Respondent erroneously argues that Ninth Circuit Court's procedure is substantially similar to that used by other Circuits when it requires that *District Court has no jurisdiction to rule on Rule 60(b) motion unless an appellate remand is first obtained.* In order to obtain an appellate remand one must first just *"ask"* the district court whether it wishes to entertain a Rule 60(b) motion. A procedure Petitioner closely followed and the District Court ruled that it had no jurisdiction to even rule on that.

The dissimilarities in the procedure for obtaining a Rule 60(b) just don't end here. "Ninth circuit court continues to insist that appellate court must remand before district court may entertain Rule 60(b) Motion." "However, the Ninth Circuit is sufficiently adamant about its *unique* procedure that it has upheld sanctions against a litigant who did not "ask" but simply made a Rule 60(b) motion directly in the district court after filing a notice of appeal." Moore's Federal Practice, 60.67[2][c], 60-209-210 (Mathew Bender, 3rd Edition).

"A competent reading of our rules and precedent would very quickly have made clear to Wright that he did

not follow the correct procedure in attempting to have the sanction motion reconsider after he had filed his notice of appeal." *Townsend v. Holmes Consulting Corp.*, 929 F.2d 1358, 1366-1367 (9th Cir. 1990).

Contrary to Respondent's assertion, the District Court cannot possibly be expected to rule on *merits* of Rule 60(b) motion unless a formal Rule 60(b) motion with genuine issues of material facts is placed before the District Court for requesting Relief from Default Summary Judgment.

Petitioner stated "Excusable Neglect" due to attorney's negligence; Fraud, misrepresentation, circumvention; newly discovered evidence and Lack of jurisdiction as grounds for relief.

The Respondent had conceded before the District Court that MIR's attorney had committed malpractice. Punishing client for the sins of his attorney does not make sense. Even if the client may have cause of action for malpractice, the client still loses by expending time, energy and money in litigation and emotional turmoil. The attorney fees in a malpractice action are not recoverable. Subjecting client into another legal action also does not best serve the interest of judicial economy. (Appendix H, I)

The lack of jurisdiction was based upon two grounds – (1) District Court awarding attorney's fees after altering the *undisputed* stipulated terms and conditions of the oral agreement by attaching on its own the terms of *"fundamental contract principle"* (Appendix F-18) (2) Third party's independent state law claims of misrepresentation were not pre-empted by ERISA pursuant to *Meadow v. Employer Health Insurance*, 47 F.3d 1006 (9th Cir. 1995).

The District Court ruling that *"No grounds* are stated that would justify the extraordinary relief" is simply not supported by the evidence on the record. (Appendix H – App. 10).

It's apparent that the district court did not review the pleadings. Why would the district court review merits of the motion when the Court felt at the outset that Court had "no jurisdiction over the case"? (Appendix E-2).

On appeal, the Ninth Circuit Court did not find that Petitioner had not stated grounds that would justify relief; instead it found district court lacked jurisdiction. (Appendix A-6). Expressing willingness to "entertain" a Rule 60(b) motion at some future date after remand does not require jurisdiction. Then how does one obtain relief pursuant to Rule 60(b) after notice of appeal is filed in the Ninth Circuit Court? That is a classic catch 22 scenario.

The Ninth Circuit Court's procedure for considering a Rule 60(b) motion after notice of appeal creates unnecessary paper shuffling by placing same issues twice before the District Court. Why not let the District Court decide a Rule 60(b) motion, then worry about remand if necessary as is the procedure employed by other Circuit Courts?

In *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997), the Ninth Circuit Court based upon guidance from this Court, *Stone v. I.N.S.*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) updated the procedure when it enumerated its *exceptions* to its general rule that filing notice of appeal divests a district court of jurisdiction. One of such exceptions under which the District Court could retain jurisdiction is to rule on a Rule 60(b) motion. However, the Ninth Circuit Court in the instant case has refused to follow the precedent and the authority of this Court.

The Respondent misses the *exceptions* listed and instead erroneously argues that Petitioner's case does not fit into the circumstances of the *Stein*.

Similarly, the Respondent erroneously tries to negate the opinion of this Court in *Stone* that the pendency of appeal does not affect the District Court's power to grant

Rule 60(b) relief by quoting *Wright & Miller.* The Respondent got it backwards. It's the Supreme Court of the United States which has the final authority to interpret and enforce laws and not *Wright & Miller.* In *Stone,* this Court provided that the closest analogy to I.N.S.' discretionary petition for agency reconsideration is the motion for relief from judgment under F.R.C.P. Rule 60(b) (*id.,* at 479).

RESPONDENT WAIVED RIGHT TO CONTEST A FRIVOLOUS UNPRESERVED ISSUE

The Respondent catching at the last straw frivolously takes issue for the first time that the Petitioner did not file a Notice of Appeal from the District Court's Order denying, "Motion to Grant Hearing on a Rule 60(b) motion." The Respondent waived objection when it did not raise the issue before the Court of Appeals.

Certiorari will be dismissed as improvidently granted where the record in the case fails to present for review the question for which certiorari was granted or if the issue for which the certiorari was granted was not presented to, or ruled on by the court below; or necessary findings were absent. *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56; 86 S. Ct. 958, *reh. den.,* 384 U.S. 934, 16 L. Ed. 2d 535, 86 S. Ct. 1440 (1966). Or no objection was taken below so as to preserve the question for review; *Tyrrell v. District of Columbia,* 243 U.S. 1, 61 L. Ed. 557, 37 S. Ct. 361 (1917).

Respondent forgets that Motion for remand was concurrently in the Ninth Circuit Court. Petitioner made Motion for Reconsideration and Clarification. The Motion Panel deferred the matter to the Appellate Panel for consolidation of the issue involving Rule 60(b) with rest of the issues on appeal. (Appendix D-2).

In *Stone,* this Court provided, "The denial of the motion is appealable as a separate final order, and if the

original appeal is still pending it would seem that the court of appeals can *consolidate* proceedings." *Stone v. I.N.S.*, 131 L. Ed. 2d 465 at 479).

PETITIONER PRESENTS ADDITIONAL QUESTION ON JURISDICTIONAL GROUNDS FOR GRANT OF WRIT OF CERTIORARI

Petitioner in order to be not repetitious at the expense of judicial economy, did not frame a second question as follows:

> "Whether District Court had jurisdiction to alter the stipulated terms of the oral agreement by awarding attorneys fees by attaching the terms of fundamental contract principal."
>
> "Court has no power to condition stipulation under Rule 41(a)(1)(ii) *Wright & Miller, 2363, Page 271, 1996.*

In *Wolfe*, the district court changed the stipulation for voluntary dismissal from without prejudice to with prejudice. The court of appeals granted mandamus and provided that the district court lacked authority to alter stipulation and cause dismissal to be with prejudice, Fed. Rules of Civ. Procedure 41(a)(1)(ii) *In Re: Wolf*, 842 F.2d 464 (D.C. Cir. 1988).

In this case the declarations by the Petitioner and the Respondent's attorney Joey Moore showed that the no award of attorneys fees in case of breach of oral agreement had been agreed upon.

Petitioner requests the court to grant certiorari on this separate jurisdictional question, which was appealed and raised before and ruled by the Ninth Circuit Court. "Jurisdictional questions will be considered by the court although not raised in the petition for certiorari." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips*

Corp., 126 L. Ed. 2d 396, 62 USLW 4007, 1993-2 CCH Trade Cases # 70428, 7 FLW Fed. S. 661 (1993, U.S.).

CONCLUSION

There is serious conflict between the procedures employed by the Ninth Circuit Court and the rest of the Circuit Courts for consideration of Rule 60(b) motion after Notice of Appeal is filed.

Petitioner closely followed the procedure employed by the Ninth Circuit, yet the Petitioner was informed by both District Court and Court of Appeals that he was not entitled to even "ask" for a *Hearing* for Grant of Rule 60(b) motion for lack of jurisdiction of the District Court.

The Petitioner in this petition has presented evidence for Relief for "Excusable Neglect due to attorney's negligence and for lack of jurisdiction of the District Court to alter terms of oral contract and award attorney's fees by attaching terms of fundamental general contract principle

WHEREFORE, the Petitioner prays that Court after considering the documents submitted, pursuant to Rule 16.1, enter an order for summary disposition on merits and vacate the decision of the Court of Appeals, reverse the District Court's order for award of attorney's fees and remand for consideration of Rule 60(b) motion.

Respectfully submitted,

Date: June 11, 1999

JEHAN Z. MIR, MD
Petitioner/Pro-se

APPENDIX H

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO GRANT HEARING ON RULE 60 MOTION DATED MAY 5, 1997

JEHAN ZEB MIR, M.D.
3633 Martin Luther King Jr. Blvd.
Suite #1
Lynwood, California 90262
(310) 637-2010

Pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JEHAN ZEB MIR, M.D. Plaintiff/Counter defendant vs. FHP, INC., a corporation, RAMIRO RUEDAS, an individual, DOES 1 through 50, inclusive Defendant/ Cross-claimant AND RELATED COUNTER-CLAIM	CASE NO. CV 95-7523 JGD (SHx) [Judge John G. Davis] Court of Appeal Case No. 97-55424 PLAINTIFF'S REPLY TO DEFENDANTS OPPOSITION TO MOTION TO GRANT HEARING ON RULE 60 MOTION Date: May 12, 1997 Time: 1:30 p.m. Courtroom: 890

I.

REPLY TO SUMMARY OF RESPONSE

(Filed May 5, 1997)

The opposition by F.H.P Inc. is ill-conceived and is designed to mislead the court to the nature and purpose

of this motion. The F.H.P. opposition is directed towards some imaginary motion made under Rule 60 when in fact no such motion under Rule 60 has been made by the plaintiff. As was pointed out in the plaintiff's motion, the procedures and policy of the Ninth Circuit Court of Appeals sanctionably prohibits filing of motion pursuant to Rule 60 Motion in the District Court after a Notice of Appeal is filed till such time the matter has been remanded to the District Court and the jurisdiction has been restored. The defendant F.H.P. should be sanctioned for filing a frivolous pleading which is of no effect since district court does not have jurisdiction of the case and violating the procedures and policy of the Ninth Circuit Court of Appeals by filing an opposition to Rule 60 Motion with intent to harass and annoy plaintiff by asking sanctions against him. The plaintiffs therefor will not be drawn into a sanctionable conduct of discussing the merits of his case for Rule 60 Motion in part or whole since this court has no jurisdiction at this time to hear any arguments regarding Rule 60 Motion. This motion is just to "ask" the court if the court would "entertain" a motion to be made under Rule 60. Asking a mere question of the court does not require jurisdiction of the matter.

The F.H.P. opposition is frivolous since it has not quoted a single statue [sic], case law, federal rules of procedures or local court rules which would establish a policy that movant should be stop [sic] short of the clerks filing window and not allowed to file this motion to "ask" or any future motion to be made under Rule 60. F.H.P. contention that plaintiff requested relief only under Rule 60(b)(i) excusable neglect in incorrect. Plaintiff requested that he should be allowed to file a motion

under Rule 60. F.H.P. or Rule 60(b) which may include any or all subsection of Rule 60.(b)

Plaintiff had an on restricted right to file and be heard on a Rule 60 Motion if the movant had filed the motion within 10 days of the entry of the Amended Summary Judgment or before filing of the Notice of Appeal and would have a right to file and be heard under Rule 60(b) motion when the mandate from Court of Appeals is issued provided it happens within one year limit. F.H.P. has not shown why now F.H.P. would be prejudice [sic] for a delay in filing of this motion beyond 10 days or before filing the Notice of Appeal. Court has no discretion to deny the leave to file or "entertain" a motion under Rule 60(b) if the court does not have that discretion either before the Notice of Appeal is filed or after the Appeal process is completed. Rule 60 Motion is remedial in nature and must be liberally construed in granting the relief let alone filing a motion to "ask" the court if the court would "entertain" a motion under Rule 60. Defaults Summary Judgments are generally disfavored and once the plaintiff if given an opportunity to be heard on its genuine issues of materials fact it would become clear that F.H.P. was not entitled to any Summary Judgment. The practice employed by all other Circuit Courts within the United States is to guarantee a Rule 60 hearing after Notice of Appeals is filed.

II.

PLAINTIFF DID NOT FILE A RULE 60(b) MOTION

Once a leave of the District Courts is obtained to file a motion the next step is to file for a motion to the Ninth

Circuit Court of Appeals to remand the case to the District Court in order to return jurisdiction on this matter. Only then a motion for Rule 60 is filed or can be heard. Any violation of this procedure of policy is sanctionable and the F.H.P. has violated that policy by raising whole gamut of issues related to burden of proof of the plaintiff for seeking relief, the merits of Summary Judgment and terms and conditions to be imposed upon plaintiff pursuant to Rule 60(b) motion. F.H.P. should be sanctioned particularly when the plaintiff in his motion clearly discussed this sanctionable policy of the Ninth Circuit Court of Appeals. "The district court's rationale for finding the motion . . . frivolous was correct and not abuse of discretion. A competent reading of over rules and precedent would very quickly have made clear Wright that he did not follow the correct procedure in attempting to have the sanctions motion reconsider after he had filed his notice of appeal"). ***(Townsend v. Holman Consulting Corp.,*** 929 F.2d 1358, 1366-1367 (9th Cir. 1990) F.H.P. is opposing some "ghost" Rule 60 motion which simply does not exist. The District Court is without any jurisdiction of this matter at this time and F.H.P.'s opposition is of no effect. Plaintiff is not required to discuss any issues raised by F.H.P. concerning the justification for Rule 60(b) Motion at this time. In fact, in *Townsend,* (*supra,* at page 1360; 1367) the court stated that all was required was to notify the district court that a remand is being requested.

III.

F.H.P. HAS FAILED TO PROVIDE ANY RATIONALE BASIS FOR COURT TO DENY A HEARING ON A RULE 60 MOTION.

F.H.P. has not quoted any statues [sic], federal rules of civil procedures, local District Court rules, case law which would provided any basis for the District Court to deny an request for filing a motion pursuant to Rule 60. This motion "asking" the District Court whether it wishes to an "entertain" the motion under Rule 60 is not preconditioned upon any reasons, justification or explanations. A Rule 60 Motion can be filed an heard without any restriction within the first 10 days of the entry of the Amended Summary Judgment or before a Notice of Appeal is filed or after the appeal process is completed provided such a motion is made within one year of the entry of the Amended Summary Judgment. Therefore plaintiff has not missed some imaginary deadline for filing of the Rule 60 Motion that it must now demonstrate "excusable neglect", mistake or inadvertence. Purpose of filing for this motion is only a procedural nicety to form a basis for the remand of the cases from the Ninth Circuit of Appeals to the District Court so motion under Rule 60(b) can be filed and heard. The Rule 60(b) is remedial in nature an must be liberally construed and such relief should be freely granted to permit the desirable legal objectives that the cases made be decided on there [sic] merits let alone granting leave to file a motion under Rule 60(b). "This rule authorizing court to relieve party or his legal representative from final judgment for mistake, inadvertence, surprise, or excusable neglect is a remedial

provision intended to prevent injustice by allowing parties their day in court even though some technical error has occurred that would otherwise be ground for default or dismissal." ***(Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n for Parish of East Baton Rouge,*** C.A. 5th, 1975, 507 F.2d 573. "It has been said that 'courts will not permit technicalities to prevent them from remedying injustice.' ***(Trueblood v. Grayson Shops of Tennessee, Inc.*** D.C. Va. 1963, 32 F.R.D. 190, 197. "Any doubt whether in the court's discretion a motion to open a judgment should be granted is resolved in the movant's favor. ***(U.S. v. Small,*** D.C.N.Y. 1959, 24 F.R.D. 429. "Rule 60 is designed to permit the desirable legal objective that cases may be decided on their merits, and it must be given a liberal construction, and only after a careful study of all the relevant considerations should courts refuse to open default judgments." ***(Patapoff v. Vollstedt's Inc.*** C.A. 9th 1959, 267 F.2d 863. "While a district judge had discretion to grant or deny a motion to vacate a default judgment, that discretion is limited by three important considerations: first, the fact that governing rule is remedial in nature and, therefore, must be liberally applied; second, by fact that default judgments are generally disfavored; and third, by fact that doubt should be resolved in favor of motion to set aside judgment so that cases may be decided on their merits when relief sought is timely and movant has a meritorious defense.

(Schwab v. Bullock's Inc. C.A. 9th, 1974, 508 F.2d 353.

The procedures employed in the other Circuit Courts grant on un-restricted right of the movant for relief under Rule 60 after a Notice of Appeal is filed.

1st Circuit "When an appeal is pending. . . . , parties may file a Rule 60(b) motion directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously.

(Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir. 1979)

2d Circuit "For proposition that "the district court can entertain and *deny* the rule 60(b) motion; however, 'if [the district court] decides in favor of it, then and then only is the necessary remand by the court of appeals to be sought' ").

(Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) (citing *Ryan v. United States Line Co.,* 303 F.2d 430, 434 (2d Cir. 1962)

3d Circuit "The Filing of a notice of appeal does not divest a district court of jurisdiction to *entertain* Rule 60(b) motion"

(United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974, 988 (3d Cir. 1992)

5th Circuit "Our court recognizes . . . 'the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal. . . . When the district court is included to grant the 60(b) motion, however, then it is necessary to obtain the leave of the court of appeals' ").

(Travelers Ins. Co. v. Liljeberg Enterprises, Inc, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994)

6th Circuit "The party seeking to file a Rule 60(b) motion. . . . should have filed that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court."

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(Brown – United States, 976 F.2d 1104, 1110-1111 (7th Cir. 1992)

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> an appeal may be taken. If, on the other hand, the district court decides that the motion should be granted, counsel for the movan [sic] should request the court of appeal to remand."

(***Pioneer Ins. Co. v. Gelt,*** 558 F.2d 1303, 1311-1312 (8th Cir. 1977)

> ***10th Circuit*** "Although it lacked jurisdiction to *grant* the Rule 60(b)(2) motion due to the appeal . . . , the court was free to consider the motion and the court could then either denied on the merits or court could have notified us of its intention to grant the motion upon proper remand.

(***Aldrich Enterprises, Inc. v. United States,*** 938 F.2d 1134, (10th Cir. 1991)

> ***D.C. Circuit*** "When both a rule 60(b) motion and an appeal are pending simultaneously, . . . the District Court may consider the 60(b) motion and, if the District court indicates that it will grant relief, the appellant may move the appellate court for a remand."

(***Hoai v. Vo.,*** 935 F.2d 308, 312 (D.C. Cir. 1991)

It is clear that there is absolutely no restriction to file and be heard on a Rule 60(b) motion in the district court after the notice of appeal is filed provided the proper procedures for each Circuit Court are followed. F.H.P.'s opposition that the plaintiff should not be granted a

"leave" to file a Rule 60 motion is baseless and should be sanctioned. (infra)

IV

ATTORNEY NEGLIGENCE QUALIFIES AS "MISTAKE" OR AS EXCUSABLE NEGLECT UNDER RULE 60(b)(i)

Attorney's negligence does qualify for relief under Rule 60(b)(i). This is a good law where court can recognize instantaneously the negligence or malpractice of an attorney and grant relief to the client. This saves time, serves justice, the interest of judicial economy by preventing a malpractice litigation and does not unjustly reward a wrongful party. "When the party is blameless attorney's negligence qualifies as "mistake "or as an" "excusable neglect" under rule governing relief from judgment. Federal Rules of Civ. Procedure, Rule 60(b)(i). 28 U.S.C.A. ***Augusta Fiberglass Coating Inc. v. Fodas Contracting*** 843, F.2d 808 (4th Civ. 1988). However, the plaintiff intends to seek relief under Rule 60(b) (i) "excusable neglect" (ii) newly discovered evidence (iii) fraud, misrepresentation, circumvention, and other misconduct (iv) lack of subject matter jurisdiction;

One of the plaintiff's genuine issues of material fact is that it was F.H.P., who violated the terms and conditions of the oral contract. That's why the Settlement Agreement was never signed because it was not in accordance with the oral agreement.

Attorney Walker's malpractice if it occurred is not the issue. The real issue is that FHP is not entitled to a Summary Judgment in the first instance. All the FHP had

was a Default Summary Judgment. Plaintiff was never given an opportunity to present his genuine issues of material fact. "When defendants believed that the matter was being handled by their attorney after they delivered the papers to him, they were not guilty of gross neglect. Therefore, they also alleged a meritorious defense and no prejudice was suffered by plaintiff, the motion to set aside default entry was granted. ***SEC v. Vogel,*** D.C.N.Y. 1969, 49 F.R.D. 297.

Plaintiff had instructed attorney Walker on March 21, 1996 to settle the matter with FHP, since the litigation was expensive (decl. Mir, 4) "Agreeing with the district court's determination that the defendant's conduct was culpable, the court of appeals nevertheless reversed the denial of the relief from the entry of default, holding that the presence of a meritorious defense and absence of prejudice to the claimant required that deposition." ***Berthelsen v. Kane,*** 907 F.2d 617 (6th Cir. 1990) "Although the factor of the culpability of the defendant favored the plaintiff, the denial of a motion to vacate the entry of default was error where the defendant possessed a meritorious defense and the plaintiff would not be prejudiced by the relief" ***FDIC v. Francisco Inv. Corp.,*** 873 F.2d 474 (1st Cir. 1989) "Failure to consider the defendants arguments as to meritorious defense constituted an abuse of discretion. ***Anilina Fabrique de Colorants v. Aakash Chems.*** 856 F.2d 873 (7th Cir. 1988)

V

PLAINTIFF FILED THE MOTION PROMPTLY AND IN REASONABLE TIME, FHP HAS NOT BEEN PREJUDICED

The Summary Judgment was entered on February 19, 1997. Plaintiff became aware of Amended Summary Judgment on February 21, 1997. On March 18, 1997 Plaintiff was finally able to get hold of his attorney Walker and substituted himself. One [sic] the same day plaintiff filed his Notice of Appeal and the district court was divested of jurisdiction of the matter. On March 28, 1997, plaintiff filed Transcript Designation and Ordering Form. On March 31, 1997 plaintiff filed motion for stay of execution of money judgment and appeared for hearing on April 14, 1997. On April 18, 1997, plaintiff filed the instant motion to "ask" the court if it would "entertain" a Rule 60(b) motion. All this was accomplished within one month of substituting as pro se. The one year limit for Rule 60(b) motion does not expire till February 18, 1998, FHP has not been prejudiced nor FHP has claimed any prejudice in its opposition. FHP's claim that motion is not filed in reasonable time is baseless. FHP quotes three cases which do not support FHP's position. Plaintiff does not accept any one of them. In *Meadows v. Dominican Republic* (9th Cir. 1987), 817 F.2d 517, the court concluded on the timeliness of defendant's motion to vacate that it was timely filed because less than one year had elapsed from the entry of judgment, however the motion was set aside because defendant had no meritorious defense. In *Ashford v. Stewart* (9th Cic. [sic] 1981), the Plaintiff failed to file a notice of appeal within thirty days of the order denying leave to file his complaint in forma pauperis. The

court of appeal had no jurisdiction to consider the merits of the ruling under Fed. R. App.P. 4(a) "Because the time for appeal had passed, the interest in finality must be given great weight." In *Jones v. Phipps* (7th Cic. [sic] 1994) 39 F.3d, 158, 163), the defendant did not file notice of appeal within thirty days while she had access to two attorneys. Filing beyond the deadline the Notice of Appeal or motion under Rule 60(b) one year limit is not the issue in the present motion.

VI

FHP's OPPOSITION IS FRIVOLOUS AND ATTORNEY VANDERPOOL MUST BE SANCTIONED

Frivolous is defined as of little weight and importance. A pleading is "frivolous" when it is clearly insufficient on its face and does not controvert the material point of the opposite pleading. "A claim or defense is frivolous if a proponent can present no rational argument in support of its claim or defense ***Leibowitz v. Amiexo, Inc.*** (Colo App. 701 P.2d, 140, 142)

"Word "Frivolous" when used in connection with sanctions imposed under Rule 11 of Federal Rule of Civil Procedure denotes filing that is **both baseless and made without reasonable and competent inquiry**. Fed. Rule Civ. Proc.Rule 11, 28 U.S.C.A. ***Townsend v. Holman*** (929 F.2d 1358 (9th Cir. 1990)

FHP's opposition is directed towards some phantom Rule 60(b) motion which the plaintiff has yet to file. Nine (9) of the eleven (11) pages of the opposition are nothing but a

repetition in verbatim of its points and authorities previously filed in support of its motion for Summary Judgment (Judicial Notice request, docu. #2, #4) as an opposition to instant motion that Mir has not satisfied the burden under Rule (60) and asked for terms and conditions to be imposed upon Mir. FHP is clearly shooting in the dark when the court does not have jurisdiction to adjudicate such issues or Mir has been given an opportunity to present his genuine issues of material fact.

Attorney Douglas Vanderpool did not make reasonable and competent inquiry to quote any authority. He didn't have to go too far to find the answers. All he had to do was to review the plaintiff's motion and he would have learnt [sic] the procedure of the Ninth Circuit Court of Appeals and sanctions imposed against an attorney in **Townsend** for filing a motion under Rule 60(b) after Notice of Appeals was filed. It appears that attorney Vanderpool did not even care to read the plaintiff's motion yet he made a declaration that he has spent 10 hours in reviewing this motion and preparing a response. In Townsend (Supra) the court stated "Determination of improper purpose in connection with signing of paper under Rule 11 must be supported by determination of frivolousness when complaint is at issue. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

The improper purpose was to harass and annoy and intimidate the plaintiff in asking actions against him requiring the plaintiff to make a concerted reply at great expense of time and effort. Plaintiff had to spend 10 hours in reviewing his opposition and preparing this reply. The attorney Vanderpool should be sanctioned in an amount of $1500.00 for filing a frivolous pleading

which was of no effect and he presented no rational basis, case law, statute, Federal Rules of Civil Procedure in support of its opposition ***(Townend [sic] v. Holman,*** Cite as 929 F.2d 1358 (9th Cir. 1990)

Wherefore, the plaintiff requests the court (1) to grant leave to file motion pursuant to Rule 60(b) (2) to impose sanctions against attorney Vanderpool for $1500.00

DATED: May 5, 1997

SIGNED /s/ Jehan Zeb Mir, MD
JEHAN ZEB MIR, MD,
Pro-se

APPENDIX I

DECLARATION OF JEHAN ZEB MIR, IN SUPPORT OF MOTION TO GRANT HEARING ON RULE 60 MOTION DATED APRIL 18, 1996

JEHAN ZEB MIR, M.D.
3633 Martin Luther King Jr. Blvd.
Suite #1
Lynwood, California 90262
(310) 637-2010

Pro per

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JEHAN ZEB MIR, M.D. Plaintiff, vs. FHP, INC., a corporation, RAMIRO RUEDAS, an individual, DOES 1 through 50, inclusive Defendants.	CASE NO. CV 95-7523 JGD (SHx) (Los Angeles Superior Court Case No. BC 127139 [Judge John G. Davies] NINTH CIRCUIT COURT APPEAL CASE NO: 97-55424 DECLARATION OF JEHAN ZEB MIR, M.D. IN SUPPORT OF MOTION TO GRANT HEARING ON RULE 60 MOTION (Filed Apr. 18, 1997)
FHP, INC., a California corporation. Counter-complainant, vs. JEHAN ZEB MIR, M.D.,	Date: May 12, 1997 Time: 1:30 p.m. Courtroom: 890

I, JEHAN ZEB MIR, M.D. declare as follows:

1. I am plaintiff pro se in this matter of Mir v. FHP CV-95-7523 JGD (SHx).

2. I am aware of the events from my personal knowledge and I have reviewed the file and familiar with the matter. I am competent to testify if called to testify.

3. On November 3, 1996, I discussed the matter of Mir v. FHP with my attorney Robert Walker. We both reached a conclusion that FHP in view of its arrogance and abundance of financial resources and threats made by Tom Knego Vice President FHP that he would rather give all the money to Law Offices of Spray, Gould & Bowers to litigate rather than give any money to me, continuation of expensive litigation in view of small amount of bill was not justified. That Mr. Walker should do whatever he could to settle the matter.

4. On March 21, 1996, I received a bill of $7,778.02 from my attorney Robert Walker to legal services rendered in the instant matter CV-95-7523 JGD (SHx). I at once called attorney Robert Walker and informed him that litigation was very expensive, that litigation must stop without further waste of time or money, that he should settle the case. Mr. Walker informed me that he would do just that.

5. Attorney Robert Walker never informed me about FHP's Motion for Summary Judgment or Amended Summary Judgment. He never sent me any notices or document relating to such motions or hearings.

6. I, on February 21, 1997, received the court order for Amended Summary Judgment awarding FHP attorneys fees in an amount of $19,491.25.

7. I immediately called his office to find out what had happened. Failing to find him there, I wrote a letter

to him. I thereafter made numerous telephone calls and left messages. I was finally able to contact my attorney Robert Walker on March 18, 1997, when he signed substitution papers. He informed me that he was caught in a marathon depositions and could not call back in time. However Mr. Walker informed me that he had reached a settlement of $6000.00 with FHP attorney prior to motion for Summary Judgment was taken by FHP. That the FHP was pushing Summary Judgment under the pretext of a Final Judgment so that I would not be able to file another law suit against FHP in this matter.

I declare under the penalty of perjury that foregoing is true and correct.

Date: 04/18/97

Signed /s/ Jehan Zeb Mir, M.D
JAHAN ZEB MIR, M.D.
Plaintiff/
counter defendant Pro se